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In The

Supreme Court of the United States

D. JOSEPH LONG, individually and derivatively as a shareholder of Regency Home Fashions, Incorporated,

Petitioner,

v.

LOUIS L. SILVER, individually as in his fiduciary capacity as a shareholder of Regency Home Fashions, Incorporated and as trustee of the express of the Louis L. Silver living trust;
ALL UNKNOWN BENEFICIARIES, of the Louis L. Silver Living Trust;
RONALD GROSSMAN, individually and in his fiduciary capacity as an officer and shareholder of Regency Homes, Incorporated;
KEVIN CREEGAN, individually and in his fiduciary capacity as an officer and shareholder of Regency Homes, Incorporated;
REGENCY HOME FASHIONS, INCORPORATED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. **Whether the District Court correctly concluded that the subject matter of the Complaint in this action was not within the scope of any arbitration agreement of the parties.**

II. **Whether the Court of Appeals erred in determining that the magistrate judge used the improper legal standard for determining whether the claims in the Complaint in this action were arbitrable.**

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, HERTZ, HERSON & COMPANY, LLP, certified public accountants, were defendants in the proceedings before the United States District Court for the Western District of North Carolina.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner D. Joseph Long, individually and derivatively as a shareholder of Regency Home Fashions, Inc., respectfully prays that a writ of certiorari will issue to review the judgment of the Court of Appeals below, which held that his claims were arbitrable because they significantly relate to two existing arbitration agreements.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit concluding that the magistrate judge used the improper legal standard for determining whether Petitioner's claims were arbitrable, and holding that Petitioner's claims significantly relate to two existing arbitration agreements, is published at 248 F.3d 309 (4th Cir. 2001), a copy of which is found in the Appendix at p. 1. The decision of the United States District Court for the Western District of North Carolina denying Defendant's Motion to Compel Arbitration and Stay Litigation is unpublished, and is found in the Appendix at p. 20.

JURISDICTION

The decision of the Court of Appeals was issued on April 27, 2001. This Petition for Writ of Certiorari is timely filed under Rule 13 of the Rules of the Supreme Court of the United States as it has been filed within ninety (90) days after entry of the judgment by the Court of Appeals.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following federal statutes:

9 U.S.C. §§ 2 - 16

The pertinent text of the statutes are set forth in the Appendix beginning at p. 38.

STATEMENT OF THE CASE

Petitioner, D. Joseph Long (hereafter "Long"), seeks review of the Order of the Court of Appeals for the Fourth Circuit holding that his claims are arbitrable because the claims significantly relate to two arbitration agreements.

A. Factual Statement

In 1972, Regency Bedspread Corporation (hereafter "Regency Bedspread") was a corporation organized and existing under the laws of the State of North Carolina and doing business in Catawba County, North Carolina. On or about August 1, 1972, Long entered into a written agreement (hereafter "the 1972 Agreement") with Silver-Pilzer. The effect of this arrangement was to provide Silver-Pilzer with 100% of Regency Bedspread outstanding voting stock. Prior to that time, 80% of the stock in Regency was owned by Silver-Pilzer with 20% owned by Long. In the 1972 Agreement, Long agreed to sell Silver-Pilzer his 20% ownership in Regency Bedspread in exchange for $13,500.00 plus 5% of the outstanding common stock in Silver-Pilzer. None of the Defendants in this action were a party to the 1972 Agreement. (App. 3-4, 21-22).

In addition to providing for the purchase of Long's shares of stock in Regency Bedspread, the 1972 Agreement provides that Silver-Pilzer, or one of its subsidiaries, will

continue to employ Long for as long as he remains a shareholder. The 1972 Agreement also places certain restrictions on Long's ability to sell his Silver-Pilzer shares, prohibits him from assigning his rights under the contract, provides a mechanism for valuing his shares, and permits Silver-Pilzer to carry life insurance on Long. (App. 3-4, 22-23). The 1972 Agreement contains an arbitration clause providing that:

> "6.1 Arbitration. Any and all disputes and controversies arising out of or in connection with this agreement, or with respect to the construction and interpretation thereof, or concerning the rights of any one or more parties hereto against any one or more parties hereto, or the respective obligations of each party hereto to each other party hereto, shall be determined by arbitration in accordance with and pursuant to the then existing rules of the American Arbitration Association."(App. 2, 23; The entire 1972 Agreement is found in the App. at p. 47-54).

The 1972 Agreement operates primarily as a stock redemption agreement. It does not make any mention of Long's salary, compensation package, job responsibilities, or any other factor relating to the operation of the business. The 1972 Agreement also does not mention any other shareholders, discuss any shareholder issues such as division of profits and/or losses or management and/or control of the Corporation, or address the manner in which the Corporation may be dissolved. (App. 23).

Regency Bedspread subsequently changed to Regency Home Fashions, Inc. ("Regency"), and Long's shares in Silver-Pilzer became shares in the new Regency entity. (App. 4, 23).

From approximately 1972 to the present, Defendant Silver has participated in conduct detrimental to the Corporation and in intentional disregard of Long's rights as a shareholder, including, but not limited to, the following conduct: (a) maintaining and keeping secret from Long the true financial records of the Corporation; (b) drawing an excessive salary of approximately $1,300,000.00 per year while doing no substantial work for the Corporation; (c) diverting monies from sales of inventory of the Corporation to his own personal use; (d) acquiring, upon information and belief, additional stock in the Corporation while having the Corporation pay the same through a redemption; and (e) upon information and belief, paying many of his own personal bills by wrongfully diverting monies belonging to the Corporation to his own use. The wrongful behavior of Defendant Silver continues even though Long confronted him in 1988 and advised it was not morally right to steal from the corporation. (App. 23-24).

In May of 1999, Defendants Silver and Grossman presented to Long the Shareholders Agreement dated May 12, 1999 ("the 1999 Agreement") which agreement attempted to correct and cover-up all the wrongdoing of the Defendants. Defendants made it clear to Long that in order to maintain his job, he must sign the documents. Defendant Grossman advised Long that it was his intention to maintain Long as an employee until Long reached the age of 70, and that said intention was memorialized in a letter dated May 13, 1999 from Grossman to Long. Based on this coercion and fraud, Long signed the May 12, 1999 Agreement as he was intimately familiar with the dealings of the Defendants and feared for his continued employment. (App. 5, 24-25). Like the 1972 Agreement, the 1999 Agreement contains an Arbitration provision. The arbitration provision includes wording that "any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration...." (App. 25; the entire 1999 Agreement is found in the App. at p. 55-70).

Six months later, Defendants terminated Long's employment by letter dated November 29, 1999 and signed by Defendant Silver. (App. 26). As a result of the termination letter and demand for the stock, Long immediately began making plans to file a lawsuit to protect his individual rights and his rights as a minority shareholder.

B. Procedural Statement

Long filed a Complaint in the Superior Court of Catawba County, North Carolina against several individuals and corporations in various capacities (hereafter the "Defendants") alleging nine causes of action including: (1) frustration of reasonable corporate expectations; (2) breach of fiduciary duty; (3) breach of contract; (4) failure to distribute corporate profits proportionately; (5) fraud; (6) civil conspiracy; (7) unfair and deceptive trade practices; (8) punitive damages; and (9) a shareholder's derivative action. (App. 5, 27). On or about February 4, 2000 the Defendants filed a Notice of Removal of Civil Action to Federal Court alleging diversity jurisdiction. The case was subsequently removed to the United States District Court for the Western District of North Carolina at Statesville. On March 2, 2000, all of the Defendants, with the exception of Hertz Herson & Company, LLP, filed a Motion to Compel Arbitration and Stay Litigation.[1] (App. 6, 27).

After the Court received a Brief in Opposition to said Motion from Long and a Reply Brief from Defendants, (App. 21) the Court entered an Order denying Defendants' Motion to Compel Arbitration and Stay Litigation. (App. 6, 35). On or about May 8, 2000 Defendants filed Notice of Appeal. (App. 6).

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[1] For the sake of brevity, the word "defendants," as used hereafter, refers to all defendants except Hertz Henson & Co., LLP.

Defendants filed their Appellants' Brief and Joint Appendix on July 11, 2000. Long filed his Appellee's Brief on August 9, 2000. The Fourth Circuit Court of Appeals heard oral arguments on March 2, 2001 and on April 27, 2001 the Court vacated the lower court's decision and remanded the case for further instructions. (App. 1-19).

Upon remand, the United States District Court for the Western District of North Carolina, Carl Horn, III, Chief Magistrate Judge, entered an Order compelling arbitration and staying the matter pending the outcome of that arbitration. On May 31, 2001, Long filed a Motion to stay arbitration pending this Court's ruling on his Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT'S ADOPTION OF THE "SIGNIFICANT RELATIONSHIP" TEST CONFLICTS WITH TESTS ADOPTED BY THE ELEVENTH, NINTH, EIGHTH, SIXTH, FIFTH, THIRD AND SECOND CIRCUITS.

I. Introduction.

In this case, the magistrate judge ruled that Long was not required to submit his claims to arbitration. In their analysis, the Fourth Circuit stated that the "magistrate judge ignored [this] controlling precedent and instead applied a legal standard that has been rejected by this Circuit." (App. 8). The Fourth Circuit rejected the magistrate judge's analysis and instead held that each of Long's claims were arbitrable under the standard articulated in American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996)(App.19).

The Fourth Circuit analyzed this case under the "significant relationship" test articulated in the Fourth Circuit case, American Recovery. The magistrate judge

analyzed this case under cases from the Second and Eleventh Circuits. Because Circuits throughout the United States use different standards in their analysis, the Fourth Circuit and magistrate judge arrived at different conclusions regarding whether Long's claims were arbitrable.

Since January 1, 1999, numerous published and non-published cases have been decided by the various Circuit Courts concerning whether a particular claim falls within the scope of an arbitration agreement. This large number of cases indicates that the issue is alive and important in today's jurisprudence. Presently there are at least two different standards for analyzing this issue. The Fourth, Seventh and Tenth Circuits have adopted the "significant relationship" test. P&P Indus. Inc. v. Sutter Corp., 179 F.3d 861 (10th Cir. 1999); Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907 (7th Cir. 1999); American Recovery. The Eleventh, Ninth, Eighth, Sixth, Fifth, Third and Second Circuits analyze the language of the arbitration agreement and the intent of the parties. *See* Telecom Italia, SPA v Wholesale Telecom Corp., 248 F.3d 1109 (11th Cir. 2001); Louis Dreyfus Negoce, SA v. Blystad Shipping & Trading, Inc., 252 F.3d 218 (2d Cir. 2001); Chiron Corp v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126 (9th Cir. 2000); Battaglia v. McKendry, 233 F.3d 720 (3d Cir. 2000); Stout v. Byrider, 228 F.3d 709 (6th Cir. 2000), cert. denied, 121 S.Ct 1088 (2001); Lebanon Chem. Corp. v. United Farmers Plant Food, Inc., 179 F.3d 1095 (8th Cir. 1999), cert. denied, 528 U.S. 1079 (2000); Texaco, Inc. v. American Trading Transp. Co. Inc., 644 F.2d 1152 (5th Cir. 1981). Given the large number of cases dealing with this issue, its importance and the differing standards of analysis, this Court should examine the cases from all Circuits and rule on the correct test to use in analyzing whether particular claims are arbitrable under an arbitration agreement.

II. United States Supreme Court Case Law on the Issue.

Written arbitration provisions are valid, irrevocable and enforceable, except upon such grounds as exist at law or equity for revocation of a contract. 9 U.S.C. §2 (2001). The Federal Arbitration Act, 9 U.S.C. §§ 1-16, requires courts to stay proceedings pending arbitration upon being satisfied that the issue is referable to arbitration under the agreement. 9 U.S.C. §3 (2001). In addition, the United States Supreme Court has adopted a "healthy regard for the federal policy favoring arbitration." If parties have agreed to arbitrate, then doubts concerning whether issues are arbitrable under an agreement "should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

The principles governing the determination of whether parties are required to arbitrate an issue was first decided in a series of cases known as the Steelworkers Trilogy: Steelworkers v. American Mfg. Co., 363 U.S. 564; Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574; and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In a 1986 case, this Court reviewed the four principles articulated in the Steelworkers Trilogy, and reiterated that because arbitration is a matter of contract the parties must have agreed to submit a dispute to arbitration before being required to do so. AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643 (1986). Furthermore, determining whether the parties have agreed to arbitrate a particular issue is an issue for the judiciary to determine and in ruling on this issue, courts are not to consider the potential merits of the underlying dispute(s). Finally, where an arbitration clause exists, there is a strong presumption of arbitrability. Id. at 648-51. In a subsequent decision, the Supreme Court stated that issues concerning whether parties have agreed to arbitrate a specific matter

should be resolved by applying ordinary state-law principles governing formation of contracts. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

Since the holdings in First Options and AT&T Techs. were handed down, other courts have declined to extend, limited to the facts and distinguished the holdings. In no case since, has this Court clearly articulated a standard by which agreements to arbitrate should be analyzed.

III. Analysis under the Standard Adopted by the Eleventh, Ninth, Eighth, Sixth, Fifth, Third and Second Circuits.

Courts in the Eleventh, Ninth, Eighth, Sixth, Fifth, Third and Second Circuits examine the language of arbitration agreements and the intent of the parties to determine whether particular disputes are arbitrable. In examining cases from all of these Circuit Courts, it is clear that the wording of the arbitration clause is extremely important. Most arbitration clauses use some type of "arising" language. However, the word or words following the "arising" language are key in determining the scope of the agreement. As with any contractual dispute, the courts are obligated to look to the express terms used by the parties as a reflection of the parties' intent. Chiron Corp. v. Ortho Diagnostic Systems, Inc., 207 F.3d 1126, 1130 (9th Cir. 2000).

In one case, the parties argued over the meaning of the phrase "arising hereunder." Mediterranean Enters., Inc. v. Sangyong Corp., 708 F.2d 1458 (9th Cir. 1983). One party claimed that the language covered "any disputes between the parties." The other party argued that "arising hereunder" meant "arising under the contract" and did not cover claims independent of or collateral to the contract. Id. at 1463. The Ninth Circuit Court entered into a detailed analysis of the meaning of different phrases and held that "arising hereunder" was synonymous with "arising under the

Agreement," both of which were held to be relatively narrow. "Arising hereunder," "arising out of the contract," and "under" were deemed phrases which restrict arbitration to those disputes relating to the "interpretation of the contract and matters of performance." All of these phrases are more narrow in scope than "arising out of or relating to" language. Id. at 1464. In deciding that "arising hereunder" did not cover matters independent of or collateral to the contract, the Ninth Circuit was persuaded by cases from the Second Circuit. Id. at 1463.

The Second Circuit entered into its analysis of arbitration early on. In 1961, a freighter moved to compel arbitration of a dispute with a charterer to tender a vessel. The language of the arbitration agreement required arbitration "if any dispute or difference should arise under this Charter...." In Re Kinoshita & Co., 287 F.2d 951 (2d Cir. 1961). Examining the arbitration provision, the Court held that the language was not sufficiently broad to cover a claim of fraudulent inducement of contract. Id. The Court noted that when arbitration agreements refer to disputes "under" or "arising out of" the contract, then arbitrable disputes are limited to such matters. Id. at 953. However, the Court remarked that had the parties used language requiring arbitration of "any controversy or claim arising out of or relating to," then arbitration would have been required. Id.

Four years later, the Second Circuit analyzed the language "[a]ll matters, disputes or disagreements arising out of or in connection with this Agreement shall be finally settled by arbitration." The Court held that the District Court erred by failing to examine each and every claim to determine if it was a "matter, dispute or disagreement arising out of or in connection with" the agreement. Necchi v. Necchi Sewing Mach. Sales Corp., 348 F.2d 693 (2d Cir. 1965). The Court ruled that disputes regarding the repurchasing of parts and assumption of responsibilities under the contract were arbitrable. However, the request to have Necchi cease and desist from unfair and deceptive trade

practices, and disputes regarding damages and the failure to negotiate in good faith were not arbitrable under the language of the agreement. Id. at 697-698.

Other Circuits have disagreed with the result in Kinoshita and the Second Circuit itself has limited the result to its facts. However, despite these limitations, the Second Circuit continues to follow its approach of analyzing the specific language of the agreement and determining whether the dispute falls within its meaning. See Battaglia v. McKendry, 233 F.3d 720, 725 (3rd Cir. 2000)(stating that "Kinoshita has been discredited both in the Second Circuit and in other jurisdictions"); Genesco Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987)(court must examine language to determine if it is broad enough to cover each claim being asserted). S.A. Mineracao da Trindade-Samitri v. Utah Int'l Inc., 745 F2d 190 (2d Cir. 1984)(declining to overrule Kinoshita but confining the case to its facts). In recent cases, the Second Circuit clearly articulated its policy of examining the language of each arbitration agreement. See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading, Inc., 252 F.3d 218 (2d Cir. 2001)(stating that "making performance or termination of this" contract was broad enough language to cover all disputes regarding the voyage); Mehler v. The Terminix Int'l Co., 205 F.3d 44 (2d Cir. 2000), cert. denied, 121 S.Ct. 2262 (2001)(the issue to be determined is whether claims relate to the arbitration agreement). In Louis Dreyfus, the Court stated that each court must determine

> whether, on the one hand, the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause, or if, on the other hand, arbitration was designed to play a more limited role in any future dispute. Id. at 225.

Other Circuits also look to the language of the arbitration provision to determine whether a particular dispute must be referred to arbitration. The Fifth Circuit followed this approach when it held that the issue of fault and negligence arising out of the collision of two boats was not arbitrable where the agreement provided for arbitration of "any and all differences and disputes arising out of this charter." Texaco, Inc. v. American Trading Transp. Co., Inc., 644 F.2d 1152 (5th Cir. 1981). The Court stated that because the claims neither arose from nor depended upon the charter, arbitration was not required. However, the Fifth Circuit noted that had the parties chosen less restrictive language such as providing for arbitration of "all disputes between the parties involving the chartered vessel" then arbitration would have been appropriate. Id. at 1154.

The Eleventh Circuit also examines the language of the arbitration agreement, but goes further and analyzes whether there is a "sufficiently close connection" between the claims and the agreement. Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984). In Armada Coal, the charterer brought an action against the vessel owner for wrongful and unlawful attachment of coal and for conversion of a letter of credit. The Court stated that while there was a connection between the claims and the party's relationship – i.e. but for the relationship, there would have been no wrongful attachment or conversion – the connection was not sufficiently close to constitute a "dispute arising during the execution" of the contract so as to require arbitration. Id. at 1568.

Recently, the Eleventh Circuit recognized that the case law in this area "yields no clear answer." Telecom Italia, SPA v. Telecom Corp., 248 F.3d 1109, 1114 (11th Cir. 2001). In Telecom Italia, the Court examined whether the parties were required to arbitrate a tortious interference with contract issue under an arbitration agreement requiring arbitration of "any disputes arising out of or relating to" the contract. The Court noted that arbitration has been required

where the tort "could not have occurred but for a breach of the contract." Id. at 1114-1115, *citing* H.S. Gregory v. Electro-Mechanical Corp., 83 F.2d 382 (11th Cir. 1996)(stating that determining whether a claim is arbitrable under the agreement "turns on the factual allegations in the complaint rather than the legal causes of action asserted"). On the other hand, the Eleventh Circuit has rejected claims that a contract arbitration clause covered a dispute concerning a tort claim not arising out of the contract or claims founded upon a different contract. Id., citing Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343 (11th Cir. 1982). The Court attempts to harmonize the results by asking whether the tort or breach was "an immediate, foreseeable result of the performance of contractual duties." If the answer is "no," then the dispute does not "arise out of" the contract. Telecom Italia, 248 F.3d at 1116.

Unlike the other circuits which find such phrases as "arising out of" and "arising under" to be narrow in scope, the Third Circuit gives broad construction to such phrases. Battaglia v. McKendry, 233 F.3d 720 (3d Cir. 2000). In adopting this construction, the Third Circuit declined to follow the Second Circuit Kinoshita and the Ninth Circuit Mediterranean Enters. decisions. Rather, the Court stated it would follow the Eleventh Circuit's approach which refused to distinguish between "arising under" and "arising out of." H.S. Gregory, 83 F.3d at 385-86 (finding that courts used "arise out of" and "arise under"interchangeably). Following its refusal to make such a distinction, the Third Circuit stated that "such an arbitration clause is broad" and should be construed to encompass claims going to the formation of the underlying agreements. Battaglia, 233 F.3d at 727(internal citations omitted), citing St. Paul Fire & Marine Ins. Co., 919 F.Supp. 133, 135 (S.D.N.Y. 1996). Because the clause was deemed "broad," the Third Circuit stated that "the presumption of arbitrability is particularly applicable." Id. at 726. This presumption leads to the conclusion that fraud in the inducement claims are subject to arbitration under

"arising hereunder" language. Id. Therefore, in the Third Circuit it appears that if the language is broad, all claims between the parties to the agreement are subject to arbitration, including claims going to the formation of the contract itself.

Most Circuits examine the express language used by the parties in determining the scope of the arbitration agreement. Coady v. Ashcraft & Gerel, 223 F.3d 1 (1st Cir. 2000)(holding arbitration clauses should be interpreted like any contractual language to determine whether the language encompasses the present dispute); Lebanon Chem. Corp. v. United Farmers Plan & Food Inc., 179 F.3d 1095 (8th Cir. 1999), cert. denied, 528 U.S. 1079 (2000)(stating that courts must examine the scope of the agreement and determine if the present dispute is included within its reach). While sometimes differing in their analysis and results, the consensus among the Eleventh, Ninth, Eighth, Sixth, Fifth, Third and Second Circuits appears to be that the specific language of each arbitration agreement must be analyzed to determine whether the parties intended the present dispute be subject to arbitration. There are no clear rules as to whether particular claims are covered by specifically phrased agreements. Therefore, each case must be analyzed on an individual basis.

IV. Analysis under the Standard Adopted by the Fourth, Seventh and Tenth Circuits.

The Fourth, Seventh and Tenth Second Circuits also examine the language of arbitration agreements. However, these Circuits do not simply analyze the language of the agreement to determine whether the language of the agreement covers the current claims. Rather, these Circuits go further and ask whether a "significant relationship" exists between the arbitration agreement and the claims. P&P

Indus., Inc. v. Sutter Corp., 179 F.3d 861 (10th Cir. 1999); Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907 (7th Cir. 1999); American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996).

The Fourth Circuit appears to be the first Circuit to have adopted the "significant relationship" test. In 1996, a consulting firm brought suit against a joint venturer alleging breach of a consulting agreement. American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88 (4th Cir. 1996). The consulting agreement contained an arbitration provision requiring that "[a]ny dispute, controversy, or claim arising out of or related to this Consulting Agreement shall be resolved by binding arbitration." Id. at 90. The Court noted that similarly phrased arbitration provisions have been deemed broad. The Court then cited another Fourth Circuit Case as standing for the proposition that broad arbitration clauses do not "limit arbitration to the literal interpretation or performance of the contract [, but] embrace[d] every dispute between the parties having a *significant relationship* to the contract regardless of the label attached to the dispute." Id. at 93; citing J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) (emphasis added). The "significant relationship" language first appearing in J.J. Ryan & Sons is derived from that Court's analysis of the International Chamber of Commerce's recommended arbitration clause. The Court noted that such language embraces every dispute having a "significant relationship" to the contract. J.J.Ryan & Sons, 863 F.2d at 321. (the clause recommended by the International Chamber of Commerce requires arbitration of "[a]ll disputes arising in connection with the present contract").

The Fourth Circuit's adoption of the "significant relationship" language as the test for determining whether claims are subject to arbitration has been followed by both the Seventh and Tenth Circuits. The Seventh Circuit has held that arbitration is required where a significant relationship existed between plaintiff's claim of tortious

interference and an arbitration provision. Kiefer Specialty Flooring, Inc., 174 F.3d at 910-11 (7th Cir. 1999). Likewise, the Tenth Circuit, citing American Recovery Corp., stated that "all claims with a significant relationship to the [Agreement,] regardless of the label attached to them arise out of and are related to the Agreement." P&P Indus., 179 F.3d at 871(internal quotes omitted). Nonetheless, while apparently recognizing that there is "no per se rule" for interpreting arbitration provisions, analysis in the Fourth, Seventh and Tenth Circuits consistently occurs using the "significant relationship" test. Id.

V. "Language of the Agreement and Intent of the Parties" *versus* "Significant Relationship"

The split among the Circuit Courts as to which test should be used presents an important issue in today's jurisprudence. Under the "language of the agreement and intent of the parties" analysis, the first duty of the courts is to determine whether the parties agreed to arbitrate this dispute. Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 844 (2d Cir. 1987). In performing this analysis, the Court should apply "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995). The parties must not only have agreed to arbitrate, but the specific dispute must fall within the substantive scope of that agreement. Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990).

In the present case, Long contends that both the facts of the case and the language of the agreements reveal that he intended for the arbitration provisions to apply only to the subject matter of the agreement itself, which subject matter concerned redemption of his shares. The Federal District Court recognized that "[t]he 1972 agreement was a simple stock purchase agreement, not the broader shareholder agreement urged by Defendants." (App. 30). Likewise, the 1999 agreement was a simple shareholder redemption

agreement which placed some limitations on shareholders' rights to sell stock in the future. (App. 30). Long did not intend to bind himself to arbitration of past wrongful conduct of Defendants. The claims in this case go far beyond issues regarding the purchase of stock. Rather, the claims relate to Defendant's improper actions in handling finances and profits of the corporation. Based on the plain language in both agreements, "the parties could not have possibly intended to bind themselves to arbitration of the claims raised."(App. 31).

The Defendants' approach is to ignore the entire agreement, focus solely on the arbitration language, and analyze this language in a vacuum, apart from the facts of the remaining agreement language. Under the "significant relationship" test propounded by Defendants and adopted by three circuits, the court would examine whether a significant relationship exists between the claims and the arbitration clause. Because the language of the arbitration clause, alone, is broad and because the agreement arises out of the contractual relationship between Long and the Defendants, the Defendants contend a "significant relationship" exists between the agreement and Long's claims. This "but for" analysis has been rejected by the Eleventh Circuit. Armada Coal, 726 F.2d at 1568 (stating that while it was true that "but for" the relationship between the parties, the tort would not have occurred, this did not constitute a close enough connection to require arbitration).

It is clear that the different analysis under the varying standards produces different results. Because arbitration disputes often involve parties from different states, it is important that the standard for deciding this issue be uniform throughout the United States.

CONCLUSION

Because the Circuit Courts disagree over the test to be used in analyzing arbitration agreements and because such an issue presents an important question in today's jurisprudence, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

D. JOSEPH LONG, individually
and derivatively as a shareholder of
Regency Home Fashions, Incorporated,
Plaintiff-Appellee,

v. No. 00-1612

LOUIS L. SILVER, individually
and in his fiduciary capacity as a shareholder of
Regency Home Fashions, Incorporated
and as trustee of the express of
the Louis L. Silver living trust;
ALL UNKNOWN BENEFICIARIES of
the Louis L. Silver Living Trust;
RONALD GROSSMAN, individually
and in his fiduciary capacity as
an officer and shareholder of
Regency Homes, Incorporated;
KEVIN CREEGAN, individually
and in his fiduciary capacity as
an officer and shareholder of
Regency Homes, Incorporated;
REGENCY HOME FASHIONS, INCORPORATED,
Defendants-Appellants,

and

HERTZ, HERSON & COMPANY, LLP,
certified public accountants,
Defendant.

Appeal from the United States District Court
for the Western District of North Carolina, at Statesville.
Carl Horn, III, Chief Magistrate Judge.
(CA-00-22-5-H)

Argued: March 2, 2001
Decided: April 27, 2001
Entered: April 27, 2001

Before WILKINS, WILLIAMS, and TRAXLER, Circuit Judges.

Vacated and remanded by published opinion. Judge Williams wrote the opinion, in which Judge Wilkins and Judge Traxler joined.

COUNSEL

ARGUED: Alan Meredith Ruley, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellants. Paul E. Culpepper, TATE, YOUNG, MORPHIS, BACH & TAYLOR, Hickory, North Carolina, for Appellee. **ON BRIEF:** James R. Fox, BELL, DAVIS & PITT, P.A., Winston-Salem, North Carolina, for Appellants. Thomas C. Morphis, Sr., TATE, YOUNG, MORPHIS, BACH & TAYLOR, Hickory, North Carolina, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Louis L. Silver, Ronald Grossman, Kevin Creegan, and Regency Home Fashions, Inc. (collectively, "Regency"), appeal from the magistrate judge's denial of their motion to compel arbitration and to stay litigation pending arbitration.[1] Relying upon a line of cases that has been rejected by this Circuit, the magistrate judge held that D. Joseph Long's claims against Regency did not fall within the ambit of the two arbitration agreements at issue. We conclude that the magistrate judge used the improper legal standard for determining whether Long's claims were arbitrable and hold that Long's claims against Regency significantly relate to the two agreements at issue. Accordingly, we vacate the magistrate judge's order and remand the case to the magistrate judge with instructions to compel arbitration and to stay litigation pending the arbitration.

I.

In 1972, Long entered into an agreement with the Silver-Pilzer Corporation ("the 1972 Agreement"). The 1972 Agreement recognizes Long as a current employee and 20% owner in the Regency Bedspread Corporation, of which Silver-Pilzer was an 80% owner. It provides that Long would become a full-time employee in an executive capacity and a 5% equity owner of the Silver-Pilzer Corporation, in exchange for redeeming his stock in the Regency Bedspread Corporation in favor of Silver-Pilzer and for other consideration. The 1972 Agreement further states that Long will continue to be employed by Silver-Pilzer or one of its

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[1] The district court referred the case to a magistrate judge by consent of the parties for all proceedings. 28 U.S.C.A.§ 636(c) (West 1993 & Supp. 2000); Fed. R. Civ. P. 73(b).

subsidiaries for as long as he remains a shareholder in Silver-Pilzer. The remainder of the 1972 Agreement deals primarily with Long's ability to dispose of his Silver-Pilzer shares during his employment and upon termination of his employment. The 1972 agreement contains a very broad arbitration clause that provides,

> [a]ny and all disputes . . . arising out of or in connection with this Agreement, or with respect to the construction and interpretation thereof, or concerning the rights of any one or more parties hereto against any one or more parties hereto, or the respective obligations of each party hereto to each other party hereto, shall be determined by arbitration in accordance with . . . the then existing rules of the American Arbitration Association.

(J.A. at 64.) The name of Regency Bedspread Corporation subsequently was changed to Regency Home Fashions, Inc. ("the Corporation"), and Long's shares in Silver-Pilzer became shares in the Corporation.

On May 12, 1999, all the shareholders in the Corporation entered into a Shareholders' Agreement ("the 1999 Agreement"). The 1999 Agreement provides for general restrictions on share transfers, a right of first refusal for non-selling shareholders, and the redemption of each shareholder's stock upon termination of that person's employment with the Corporation or upon that person's death. The 1999 Agreement also includes a very broad arbitration clause that provides,

> [t]his agreement shall be construed and enforced in accordance with the laws of the State of New York applicable to contracts and agreements executed and to be performed wholly in New York. The parties hereby irrevocably and unconditionally agree that any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration by a single arbitrator to take place in New York City under the rules of the American Arbitration Association then in effect.

(J.A. at 81-82.) The 1999 Agreement further provides that it "supersedes any and all prior agreements" that pertain to its subject matter. (J.A. at 83.)

Long claims that the shareholders threatened to terminate his employment if he did not sign the 1999 Agreement, and that on May 13, 1999, Silver sent Long a letter informing him that if Long signed the 1999 Agreement, Silver would maintain Long as an employee until he reached the age of 70. Despite this promise, approximately six months after Long signed the 1999 Agreement, Silver fired Long.

II.

On January 19, 2000, Long filed this civil action in the General Court of Justice for the State of North Carolina, Superior Court Division alleging nine claims arising from his shareholder and employment relationship with the Corporation: (1) frustration of reasonable expectation; (2) breach of fiduciary duties; (3) breach of contract; (4) failure to distribute profits proportionately; (5) fraud; (6) civil conspiracy; (7) unfair and deceptive trade practices; (8) punitive damages; and (9) a shareholder's derivative action.

Specifically, Long alleged that Silver diverted funds properly belonging to the Corporation for Silver's personal use and that the other shareholders, who became shareholders in 1999, breached their fiduciary duties to the Corporation and to Long by contributing to Silver's schemes to divert funds.

On February 4, 2000, Regency removed the action to the United States District Court for the Western District of North Carolina pursuant to diversity jurisdiction under 28 U.S.C.A.§ 1332 (West 1993 & Supp. 2000). On March 2, 2000, Regency moved to stay the litigation and to compel arbitration based upon the arbitration clauses in the 1972 and 1999 Agreements. On April 28, 2000, the magistrate judge entered an order denying Regency's motion. On May 8, 2000, Regency filed a notice of appeal with this Court.

III.

Before turning to the merits of Regency's appeal, we first must determine whether diversity jurisdiction is proper.[2] Although the magistrate judge noted that removal "appears to be proper," and jurisdiction has not been challenged by Long, (J.A. at 103), Long alleges in his Complaint that Regency Home Fashions' principal place of business is North Carolina. If this assertion is true, we are bound to dismiss for lack of subject matter jurisdiction because Long also is a citizen of North Carolina. See 28 U.S.C.A.§ 1332(c)(1) (providing that a corporation is a citizen of "any State by which it has been incorporated and of the State where it has its principal place of business").

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[2] Although neither party addressed this issue, we are duty-bound to clarify our subject matter jurisdiction because questions of subject matter jurisdiction "`concern the court's very power to hear the case.'" Owens-Illinois, Inc. v. Meade, 186 F.3d 435, 442 n. 4 (4th Cir. 1999) (quoting 2 James Wm. Moore et al., Moore's Federal Practice§ 12.30 [1] (3d ed. 1998)).

In Mullins v. Beatrice Pocahontas Corp., 489 F.2d 260 (4th Cir. 1974) (per curiam), we noted that two divergent approaches exist for purposes of ascertaining the "principal place of business" of a corporation under § 1332(c). "One approach makes the home office, or place where the corporation's officers direct, control, and coordinate its activities, determinative. The other looks to the place where the bulk of corporate activity takes place." See id. at 262 (internal quotation marks omitted); see also Peterson v. Cooley , 142 F.3d 181, 184 (4th Cir. 1998) (noting that we have adopted neither test to the exclusion of the other).

The facts that are determinative of the Corporation's principal place of business are not in dispute. Regency Home Fashion's corporate headquarters, sales, and financial offices are located in New York. In addition, the Corporation's president, CEO, and other top officers are all residents of New York. It has one manufacturing plant in North Carolina. The Corporation has no other presence in North Carolina.

Regardless of whether the nerve center or the place of operations test applies, we hold that Regency Home Fashions' principal place of business is New York because the undisputed facts establish that the bulk of the corporate activity takes place in New York and that the Corporation's "home office" is located in New York. See Peterson, 142 F.3d at 184 (noting that when a corporation has"multiple centers of manufacturing, purchasing, or sales," we focus on "the place where the bulk of corporate activity takes place" as opposed to the corporation's "home office" (internal quotation marks omitted)).

We note that the nature of a corporation's presence in a particular state is determined on a case by case basis. See Athena Automotive, Inc. v. DiGregorio, 166 F.3d 288, 291 (4th Cir. 1999). Long, however, has declined to present any factors to the district court or to this Court that support a finding that the bulk of Regency Home Fashions' activities takes place in North Carolina rather than in New York.

Indeed, when questioned at oral argument, counsel for Long represented that Long never intended to argue that diversity jurisdiction was improper.[3] Absent some other factors pointing to the substantial character of the Corporation's activities in North Carolina, the fact that one manufacturing facility is located in North Carolina does not detract from our finding that the bulk of the Corporation's activities takes place in New York, in which all of the Corporation's financial and sales offices are located, as well as its headquarters and chief officers. Accordingly, we find no basis in the record to conclude that North Carolina, rather than New York, is Regency Home Fashions' principal place of business. Thus, diversity jurisdiction is proper.

IV.

Turning to the merits, Regency contends that the magistrate judge erred by denying its motion to compel arbitration and to stay proceedings pending arbitration. We review de novo the magistrate judge's conclusions regarding the arbitrability of the disputes between Regency and Long. See United States v. Bankers Ins. Co., ___ F.3d ___, No. 00-1342, 2001 WL 293669 at *2 (4th Cir. March 27, 2001).

Although we have previously articulated the governing standard for resolving the arbitrability of disputes, see American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996), the magistrate judge ignored this controlling precedent and instead applied a legal standard that has been rejected by this Circuit. After reviewing the arbitrability of Long's claims under the proper

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[3] Waiver or estoppel principles cannot confer subject matter jurisdiction on a court that would otherwise lack it. American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951). Nevertheless, where, as here, the record is bereft of any support, beyond a single conclusory allegation in Long's Complaint, for the conclusion that the Corporation's principal place of business is in North Carolina and instead supports a finding that the principal place of business is located in New York, we simply have no basis from which to conclude otherwise.

legal standard, we find that each of Regency's claims falls within the scope of the arbitration clauses of the 1972 and 1999 Agreements.

A.

The Federal Arbitration Act applies to contracts "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C.A. § 2 (West 1999). The parties do not dispute that the FAA applies to the arbitration clauses contained in the 1972 and 1999 Agreements. The Supreme Court has announced its "healthy regard for the federal policy favoring arbitration" and has explained that the Federal Arbitration Act "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). To that end,"the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989) (internal quotation marks omitted). Thus, we may not deny a party's request to arbitrate an issue "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[4] United Steelworkers of

[4] Although both the 1972 and the 1999 Agreements contain New York choice-of-law provisions, federal law continues to govern the arbitrability of Long's claims. See Smith Barney, Inc. v. Critical Health Sys. of North Carolina, Inc., 212 F.3d 858, 861 n.1 (4th Cir. 2000) (stating, in a case arising under an agreement containing a New York choice-of-law provision, that "[b]ecause arbitration contracts must be construed in accordance with federal law, we are not bound by New York state decisions").

America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). Having established our principles for review, we turn to Regency's arguments.

B.

Regency first argues that the magistrate judge erred by failing to apply the proper legal standard to determine the arbitrability of Long's claims against Regency. In American Recovery, we held that a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. See American Recovery, 96 F.3d at 93. The arbitration clauses contained in the 1972 and 1999 Agreements are worded in the same broad manner as the arbitration clause at issue in American Recovery. See id. (holding that an arbitration clause that provided arbitration for any dispute that "ar[ose] out of or related to" the agreement was a broad clause, "capable of expansive reach"). The 1972 Agreement states that it applies to "[a]ny and all disputes . . . arising out of or in connection with this Agreement." (J.A. at 64.) Similarly, the 1999 Agreement states that it applies to "any dispute arising out of or relating to this Agreement." (J.A. at 81); cf. Prima Paint Corp. v. Flook & Conklin Mfg. Co., 388 U.S. 395, 398 (1967) (labeling as "broad" a clause that required arbitration of [a]ny controversy or claim arising out of or relating to this Agreement"); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988) (declaring that the scope of a clause providing for the arbitration of "[a]ll disputes arising in connection with" a contract was identical to that of a clause providing for the arbitrability of disputes that "may arise out of or in relation to" an agreement and construing the arbitration clause to "encompass a broad scope of arbitrable issues."). Thus, the

governing standard for determining the arbitrability of Long's claim is whether Long's claims have a significant relationship to the 1972 or 1999 Agreements.

Instead of applying the significant relationship test articulated in American Recovery, the magistrate judge relied upon cases decided under the standard enunciated in Mediterranean Enterprises v. Ssangyong Corporation, 708 F.2d 1458, 1463-64 (9th Cir. 1983), despite our explicit, unambiguous rejection of Mediterranean Enterprises in American Recovery when dealing with a broadly-worded arbitration clause similar to those in the 1972 and 1999 Agreements. See American Recovery, 96 F.3d at 92 ("We agree with CTI that the standard in Mediterranean Enterprises was an improper foundation for the district court's decision."). The magistrate judge further concluded that the 1972 and 1999 Agreements were narrow in scope, indicating that "the parties could not have possibly intended to bind themselves to arbitration of the claims raised." (J.A. at 106). As we noted in American Recovery, however, although the intention of the parties is relevant, "the intentions of parties to an arbitration agreement are generously construed in favor of arbitrability." See American Recovery, 96 F.3d at 94. Here, as in American Recovery, the parties explicitly agreed on arbitration clauses "that by[their] plain language ha[ve] a broad scope." See id. Thus, it is not inconsistent with the intentions of the parties to give the arbitration clauses broad effect. See id. Accordingly, we agree with Regency that the magistrate judge erred by refusing to apply American Recovery to determine the arbitrability of Long's claims.

C.

Applying American Recovery's significant relationship test and bearing in mind the strong federal policy favoring arbitration, we examine each of Long's claims seriatim.[5]

1.

In his first claim against Regency, Long contends that Regency's shareholders frustrated his reasonable expectations as a shareholder and an employee of the Corporation. In his complaint, Long bases his frustration of reasonable expectations claim on three types of expectations -- (1) an expectation of continued employment; (2) an expectation of meaningful participation in the management and affairs of the Corporation; and (3) an expectation of a reasonable payout for his shares.

We agree with Regency that all of Long's expectations derive from the 1972 and 1999 Agreements; thus, Long's frustration of reasonable expectations claim is significantly related to both Agreements and is arbitrable. Long's expectation of continued employment for so long as Long was a shareholder arises directly from the 1972 Agreement, which states that Long would have continued employment for so long as he remained a shareholder. Long's expectation of meaningful participation in the management and affairs of the Corporation also arises directly from the 1972 agreement, which states that Long would be employed in "an executive capacity" during his time as a shareholder. (J.A. at 57.) Finally, Long's expectation of a reasonable payout for his shares derives directly from the 1999 Agreement, which superseded the

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[5] We look to the provisions of the 1972 Agreement only to the extent the provisions of the 1972 Agreement do not conflict with those of the 1999 Agreement. Where the provisions conflict, we rely upon the 1999 Agreement.

1972 Agreement's share redemption provisions. The value of Long's shares is based upon the redemption provisions set forth in the 1999 Agreement. Accordingly, proof of each aspect of Long's reasonable expectations claim depends on the terms and existence of the 1972 and 1999 Agreements. Thus, the magistrate judge erred by finding this claim not to be arbitrable.

2.

In his second claim against Regency, Long argues that Silver and the other shareholders breached their fiduciary duties to Long as a shareholder in the Corporation. Long's breach of fiduciary duty claim arises only by virtue of Long's status as a shareholder, and the 1972 Agreement creates Long's status as a shareholder. Because Long would not have a valid breach of fiduciary duty claim but for the existence of the 1972 Agreement creating his status as a shareholder in the Corporation, we hold that Long's breach of fiduciary duty claim is properly referable to arbitration. Cf. Harter v. Iowa Grain Co., 220 F.3d 544, 549-51 (7th Cir. 2000) (affirming the district court's submission of a breach of fiduciary duty claim to arbitration).

3.

Long's third claim is for breach of contract arising from Regency's termination of Long. Long contends that his termination breached the portion of the 1972 Agreement that provides that Long was entitled to continued employment for so long as he was a shareholder. Because this breach of contract claim arises directly under the 1972 Agreement, it is clearly arbitrable. See J.J. Ryan & Sons, 863 F.2d at 321 (noting that claims involving the "literal terms or performance" of the contract fall within the scope of even the most limited arbitration clauses).

4.

Long's fourth claim is for failure to distribute profits proportionately. In support of this claim, Long alleges that the Corporation improperly redeemed shares from David Silver and that shares were transferred between shareholders without authority, diluting Long's rights and profits as a shareholder. The 1999 Agreement sets forth the rights of all the shareholders as to the proper redemption of shares and authority to transfer share ownership. Accordingly, proof of Long's claim will necessarily depend upon the terms of the 1999 Agreement and the construction of such terms. Thus, Long's claim for failure to distribute profits proportionately is significantly related to the 1999 Agreement. See American Recovery, 96 F.3d at 95 (noting that when proof of the claim is rooted in the terms and existence of the contract, the claim is arbitrable).

5.

Long's fifth claim is for fraud. Long alleges in his complaint that he was fraudulently induced into entering into the 1999 Agreement, in that the parties coerced him into signing the agreement by promising him that if he signed the agreement, Long would be employed with the Corporation until he was seventy. As early as 1967, the Supreme Court held that a claim of fraud that related to inducement of an agreement generally is covered by an "arising out of or relating to this agreement" arbitration clause. Prima Paint, 388 U.S. at 406; see also Peoples Sec. Life Ins., 867 F.2d at 813-14 (holding that a fraud in the inducement claim is arbitrable). Thus, Long's fraud claim is significantly related to the 1999 Agreement and is subject to arbitration.

6.

Long's sixth claim is for civil conspiracy. Long alleges that Regency conspired to obtain Long's signature on the 1999 Agreement for the purpose of preventing him from challenging their past fraudulent, self-serving dealings within the Corporation. To the extent Long's civil conspiracy claim is premised upon these allegations, similar to the fraud in the inducement claim, the conspiracy claim is significantly related to the 1999 Agreement and is, therefore, arbitrable. See, e.g., J.J. Ryan & Sons, 863 F.2d at 322 (holding that claim of conspiracy was significantly related to the contract and was, therefore, arbitrable); cf. Jeske v. Brooks, 875 F.2d 71, 75 (4th Cir. 1989) (holding that allegations of fraud, lack of consideration, overreaching, and unconscionability are arbitrable). To the extent the conspiracy claim is related to the shareholders' alleged breach of fiduciary duties and failure to distribute profits properly, Long's conspiracy claim is referrable to arbitration because it is significantly related to both the 1972 and 1999 Agreements, in that proof of the claim depends on the terms and existence of both agreements.

7.

Long's seventh claim against Regency is for unfair and deceptive trade practices, both individually and in the shareholders' fiduciary capacities. To the extent this claim relates to the alleged fraud and/or conspiracy in inducing Long to sign the 1999 Agreement, the claim is arbitrable because it is significantly related to the 1999 Agreement. See J.J. Ryan & Sons, 863 F.2d at 319 (holding that an unfair and deceptive trade practice claim was "manifestly" in connection with the agreement and, thus, subject to arbitration). To the extent this claim relates solely to the alleged breaches of fiduciary duties, it is significantly related

to the 1972 Agreement because the 1972 Agreement established Long's status as a shareholder, thereby creating the duties underlying the claim. Thus, we likewise find that Long's unfair and deceptive trade practices claim is subject to arbitration.

8.

Long's eighth claim is for punitive damages with respect to all of the above claims. Because the issue of punitive damages was not exempted from the arbitration clauses by the governing agreements, Long's punitive damages claim is subject to arbitration. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-60 (1995) (holding that punitive damages claims are subject to arbitration unless the contract exempts such claims from the coverage of the arbitration clause).

9.

Long's ninth claim is for a shareholder's derivative action. The 1972 Agreement specifically provides that Long's status as a shareholder ceases immediately upon his termination. Similarly, the 1999 Agreement provides for the redemption of Long's shares immediately upon his termination. Because Long can only claim a shareholder's derivative action if he is in fact a shareholder, the terms of these two agreements will necessarily be relevant to determining the viability of his shareholder derivative suit. Accordingly, the claim is significantly related to the two contracts and is properly referable to arbitration. See American Recovery, 96 F.3d at 93-95 (holding that when the proof of the claim is rooted in the existence or terms of the agreement, the agreement is significantly related to the claim).

V.

Long argues that, despite applying the wrong standard to determine arbitrability, the magistrate judge was correct to deny arbitration because the shareholders were not parties to the 1972 Agreement. Long contends that the non-signatory shareholders cannot invoke the arbitration clause in the 1972 Agreement against Long.[6]

A non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract. For example, in J.J. Ryan Sons, 863 F.2d 315 (4th Cir. 1988), we explained that when allegations against "a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." See id. at 320-21; see also Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993) (holding that because claims against the non-signatory were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims (internal quotation marks omitted)); Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp., 659 F.2d 836, 840-41 (7th Cir. 1981) (finding a signatory equitably estopped from repudiating arbitration clause in agreement on which suit against non-signatory was based).

In this context, we see little difference between a parent and its subsidiary and a corporation and its shareholders, where, as here, the shareholders are all officers and members of the Board of Directors and, as the only shareholders, control all of the activities of the corporation. Cf. Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995) (noting theories of contract and agency law as examples under which a non-signatory can

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[6] Only Regency Home Fashions, via its predecessor, was a party to the 1972 Agreement. All of the shareholders, however, were parties to the 1999 Agreement.

compel arbitration, including agency and veil piercing/alter ego). As in J.J. Ryan, the facts and claims against the Corporation and its shareholders are so closely intertwined that Long's claims against the non-signatory shareholders of the Corporation are properly referable to arbitration even though the shareholders are not formal parties to the 1972 Agreement. Likewise, the claims under the 1999 Agreement, of which all shareholders were formal parties, are similar to and dependent upon the claims under the 1972 Agreement. If the non-signatory shareholders were forced to litigate the issues arising under the 1972 Agreement, the arbitration proceedings involving the 1972 Agreement against the Corporation, as well as the arbitration proceedings involv\ing the 1999 Agreement, "would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." Sam Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679, 681 (5th Cir. 1976).

Moreover, Long seeks to claim the benefit of his shareholder status and right to continued employment by virtue of the 1972 Agreement against the non-signatories to the 1972 Agreement while "simultaneously attempting to avoid the terms of an arbitration provision contained therein." United States v. Bankers Ins. Co., ___ F.3d ___, No. 00-1342, 2001 WL 293669 at * 6 (4th Cir. March 27, 2001). Allowing Long to avoid the consequences of the 1972 Agreement while invoking its benefits in a suit against the shareholders would "both disregard equity and contravene [the FAA]." International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000 (internal quotation marks omitted)). Because all the parties in the present litigation were signatories to the 1999 Agreement, the issues arising under and relating to the 1999 Agreement are properly arbitrable. Additionally, because the facts and claims against the Corporation and its shareholders are inextricably intertwined and because Long is claiming the benefit of his shareholder and employee status by virtue of the 1972 Agreement in his suit against the Corporation

and the shareholders, we hold that the non-signatory shareholders can compel arbitration against Long with respect to the issues arising under and relating to the 1972 Agreement.

VI.

In summary, we hold that the district court erred by denying Regency's motion to compel arbitration and to stay proceedings pending arbitration because Long's claims fall within the scope of the arbitration clauses of the 1972 and 1999 Agreements. We further hold that the non-signatory shareholders may invoke the arbitration clause of the 1972 Agreement against Long. We remand for further proceedings consistent with this opinion.

VACATED AND REMANDED WITH INSTRUCTIONS

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
STATESVILLE DIVISION
DOCKET NO. 5:00CV22-H

D. JOSEPH LONG, INDIVIDUALLY AND DERIVATIVELY AS A SHAREHOLDER OF REGENCY HOME FASHIONS, INCORPORATED, Plaintiff,	)
v.	)
LOUIS L. SILVER, INDIVIDUALLY AND IN HIS FIDUCIARY CAPACITY AS A SHAREHOLDER OF REGENCY HOME FASHIONS, INC.; LOUIS L. SILVER AS TRUSTEE OF THE EXPRESS OF TRUST OF THE LOUIS L. SILVER LIVING TRUST; ALL UNKNOWN BENEFICIARIES OF THE LOUIS L. SILVER LIVING TRUST; RONALD GROSSMAN, INDIVIDUALLY AND IN HIS FIDUCIARY CAPACITY AS AN OFFICER AND SHAREHOLDER OF REGENCY HOME FASHIONS, INC.; KEVIN CREEGAN, INDIVIDUALLY AND IN HIS FIDUCIARY CAPACITY AS AN OFFICER AND SHAREHOLDER OF REGENCY HOME FASHIONS, INC; REGENCY HOME FASHIONS, INC., HERTZ, HERSON & COMPANY, LLP, CERTIFIED PUBLIC ACCOUNTANTS, Defendants.	)

MEMORANDUM AND ORDER

Entered April 28, 2000

THIS MATTER is before the court on the following motions and memoranda:

1. "Defendants Louis L. Silver, Ronald Grossman, Kevin Creegan, and Regency Home Fashions, Inc.'s Motion to Compel Arbitration and Stay Litigation" filed March 2, 2000 (document #5);
2. "Defendants Louis L. Silver, Ronald Grossman, Kevin Creegan, and Regency Home Fashions, Inc.'s Brief in Support. . ." filed March 2, 2000 (document #6);
3. "Motion of Defendant Hertz, Herson & Company, to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, for a More Definite Statement and Stay of Proceedings" filed March 2, 2000 (document #7);
4. "Plaintiff's Brief in Opposition to Motion to Compel Arbitration and Stay Litigation" filed March 30, 2000 (document #15);
5. "Plaintiff's Brief in Opposition to Hertz Herson's motion to Dismiss . . ." filed April 3, 2000 (document #16);
6. Plaintiff's "Affidavit of D. Joseph Long" filed April 3, 2000 (document #17);
7. "Defendant's Reply Brief in Support of Motion to Compel . . ." filed April 10, 2000 (document #18)' and
8. "Reply Memorandum in Support of Motion of Defendant Hertz Herson . . ." filed April 17, 2000 (document #19).

The parties have consented to Magistrate Judge jurisdiction under 28 U.S.C. § 636(c), and these motions are now ripe for the Court's determination.

Having carefully considered the parties' arguments, the record, and the applicable authority, the undersigned will deny both "Defendants Louis L. Silver, Ronald Grossman, Kevin Creegan, and Regency Home Fashions, Inc.'s Motion to Compel Arbitration and Stay Litigation" and the "Motion of Defendant Hertz, Herson & Company, to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, for a More Definite Statement and Stay of Proceedings."

I. FACTUAL AND PROCEDURAL BACKGROUND

Prior to August 1, 1972, Plaintiff D. Joseph Long ("Long") was an employee and 20% shareholder of Regency Bedspread Corporation ("Regency"), a North Carolina corporation with its primary manufacturing facility in Catawba County, North Carolina.

Prior to August 1, 1972, the Silver-Pilzer Company, Inc. ("Silver-Pilzer") owned 80% of regency's outstanding shares. Defendant Louis Silver was Silver-Pilzer's principal shareholder and a chief executive officer.

On August 1, 1972, Plaintiff Long entered into a singed written agreement ("the 1972 agreement") with Silver-Pilzer, in which Long agreed to sell Silver-Pilzer his 20% ownership in Regency in exchange for 5% of the outstanding common stock in Silver-Pilzer plus $13,500, thus giving Silver-Pilzer 100% of Regency's outstanding voting stock. The 1972 agreement provided that Long's employment with Regency would continue as long as he owned the Silver-Pilzer shares.

In addition to providing for the purchase of Long's Regency shares and his continued employment, the 1972 agreement placed certain restrictions on Long's ability to sell his Silver-Pilzer shares; prohibited him from assigning his

rights under the contract; provided a mechanism for valuing Long's shares; permitted Silver-Pilzer to carry life insurance on Long; an included the following arbitration clause:

> 6.1 Arbitration. Any and all disputes and controversies arising out of or in connection with this Agreement, or with respect to the construction and interpretation thereof, or concerning the rights of any one or more parties hereto against any one or more parties hereto, shall be determined by arbitration in accordance with and pursuant to the then existing rules of the American Arbitration Association.

The 1972 agreement makes no mention of Long's salary/compensation package - other than to state that they were to be determined later, Long's job responsibilities, or a method for evaluating Long's job performance. Nor does the 1972 agreement mention the other shareholders, address any other shareholder/partner issues, such as division of profits/losses or management/control of the corporation, or address the manner of dissolving the corporation.

The name of Regency Bedspread Corporation subsequently was changed to Regency Home Fashions, Inc., and Long's shares in Silver-Pilzer became shares in the new Regency entity.

The Plaintiff alleges that from 1972 to the time the suit was filed, the Defendants engaged in conduct which was illegal and/or detrimental to Regency, and in intentional violation of the Plaintiff's rights as a shareholder. Specifically, the Plaintiff alleges:

(a) that the Defendants maintained and kept secret from the Plaintiff Regency's true financial records;

(b) that Defendant Louis Silver drew an annual salary of approximately $1,300,000.00 while doing no substantial work for Regency;

(c) that Defendant Louis Silver diverted monies from sales of Regency's inventory to his own personal use;

(d) that the Defendants acquired additional Regency stock which was improperly purchased with corporate assets;

(e) that Defendant Louis Silver paid many of his own personal bills through Regency;
and

(f) that Defendant Louis Silver otherwise wrongfully diverted Regency assets to his own use.

Plaintiff alleges that he confronted Louis Silver in 1988 about his selling Regency inventory to third parties, including Resource Design, an entity solely owned by Silver. Plaintiff alleges that most of the proceeds from these sales of inventory were not recorded on the corporate books, but instead were paid directly to Silver at his direction and insistence. Additionally, Plaintiff alleges that Resource paid Regency only a fraction of the invoiced amount, and on certain occasions did not pay for the merchandise at all. Plaintiff alleges that Silver's scheme allowed him to drain Regency illicitly and improperly of more than $3,000,000.

On May 12, 1999, all Regency shareholders - Long, Louis silver, the Louis L. Silver Living Trust, Ronald Grossman, and Kevin Creegan - signed a Shareholders Agreement ("the 1999 agreement"). The Plaintiff alleges

that Defendants Silver and Grossman, then serving as Regency's CEO, prepared the 1999 agreement, which he characterizes as an attempt to cover-up past wrongdoing, and plainly told him to keep his job, he had to sign it. The Plaintiff also alleges that Defendant Grossman promised him if he signed, he would remain employed until he reached the age of 70, a promise which was memorialized in a May 13, 1999 letter form Grossman to Long.

Although broadly labeled a "Shareholders Agreement," the 1999 agreement was actually much narrower in focus, simply restricting the sale of stock and establishing a method for redemption of stock upon either termination of Regency employment or death. Similar to the 1972 agreement, the 1999 agreement contained an arbitration clause, which provided:

> 9(g) Governing Law; Arbitration. This agreement shall be construed and enforced in accordance with the laws of the state of New York applicable to contracts and agreements executed an to be performed wholly in New York. The parties hereby irrevocably and unconditionally agree that any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration by a single arbitrator to take place in New York City under the rules other the American Arbitration Association then in effect. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, with the attorneys fee and expenses of the prevailing party paid by the other party.

The 1999 agreement also provides that it "supercedes any and all prior agreements, whether written or oral, that pertains to its subject matter."

Six months after the 1999 agreement was executed, by letter dated November 29, 1999, Defendant Louis Silver terminated the Plaintiff's employment. Silver later demanded the Plaintiff surrender his stock in accordance with the 1999 agreement.

The Plaintiff alleges that principals with Defendant Hertz Herson & Company, LLP, Certified Public Accountants ("Hertz Herson"), were personally aware of the improper and/or illegal financial transactions involving Louis Silver and the other Defendants, yet continued to certify Regency's financial records and thereby allowed the violations to continue. Specifically, the Plaintiff alleges that Hertz Herson:

(a) Provided personal accounting services to Regency shareholders and officers while billing Regency for the work;
(b) Knowingly undervalued corporate inventory;
(c) Facilitated Defendant Louis L. Silver's illegal taking of cash and other corporate assets from Regency;
(d) Knowingly prepared false documents in connection with certified audits; and
(e) Knowingly prepared false tax returns.

Hertz Herson had performed accounting services for Regency since the early 1970's and its principals were well aware that most of the corporate assets and operations were located in North Carolina. The Plaintiff alleges that each year Hertz Herson sent four to six partners and employees to North Carolina to oversee inventory reviews, observe and certify Regency's books and ledgers, and to consult and

perform other financial functions. Additionally, the Plaintiff alleges that Hertz Herson provided ongoing consulting services, oversaw the installation of a new computer system, recruited a company comptroller, and designed, implemented, and maintained cost control systems for Regency's North Carolina operations, as well as performing similar services for other clients in North Carolina.

The Plaintiff filed this lawsuit on January 19, 2000 in the Superior Court of Catwba County, alleging nine claims:

(1) frustration of reasonable expectation;
(2) breach of fiduciary duties;
(3) breach of contract;
(4) failure to distribute profits proportionally;
(5) fraud;
(6) civil conspiracy;
(7) unfair and deceptive trade practices;
(8) punitive damages; and
(9) a shareholders derivative action.

On February 4, 2000, Defendants removed the state action to this Court based on diversity jurisdiction. Removal appears to be proper and has not been challenged by the Plaintiff.

On March 2, 2000, Hertz Herson moved to dismiss based on a lack of personal jurisdiction, or in the alternative for a more definite statement and stay of proceedings, and the remaining Defendants moved to compel arbitration and stay litigation. These motions have been fully briefed and are now ripe for resolution.

II. DISCUSSION

A. Motion to Compel Arbitration and Stay Litigation

The Federal Arbitration Act ("FAA") establishes a federal policy favoring the enforcement of written agreements to arbitrate. Specifically, the FAA provides that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1999). The FAA also requires courts to stay proceedings if the issues presented are covered by an arbitration agreement, and to compel arbitration in the event of a refusal to comply with a valid agreement to arbitrate. See 9 U.S.C. § 3(1999).

On the other hand, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960); see also AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648 (1986); Johnson v. Circuit City Stores, Inc., 148 F.3d 373, 377 (4th Cir. 1998) and Arrants v. Buck, 130 F.3d 636, 640 (4th Cir. 1997).

As Defendants correctly note, the Supreme Court has instructed that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991), quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). "Pursuant to that liberal policy, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone, 460 U.S. at 24-25. See also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273-74 (4th Cir. 1997).

However, as the Supreme Court has also instructed, the purpose of the FAA is not simply to promote the expeditious resolution of claims, but rather "to ensure judicial enforcement of privately made agreements to arbitrate." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985). See also Glass v. Kidder Peabody & Co., Inc., 114 F.3d 446, 452 (4th Cir. 1997).

Therefore, the first duty of the district court when reviewing an arbitration proceeding under the FAA is to conduct a substantive arbitrability inquiry - - meaning the court "engage[s] in a limited review to ensure that the dispute is arbitrable - - i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." Glass, 114 F.3d at 452, citing Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990).

In making this determination, the Court applies "ordinary state-law principles that govern the formation of contracts." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); see also Arrants, 130 F.3d at 640 ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law").

In applying the North Carolina Uniform Arbitration Act ("NCUAA"), N.C. Gen. Stat. §1-567.2, the North Carolina Courts have also recognized a state policy favoring arbitration. See Prime South Homes, Inc. v. Byrd, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991). However, before a particular dispute must be arbitrated, a valid agreement to arbitrate must exist and it must cover that particular dispute. See Rough v. Snap-On Tools Corp., 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992); and Southern Spindle and Flyer Co., Inc. v. Milliken & Co., 53 N.C. App. 785, 786, 281 S.E.2d 734, 735 (1981) disc. review denied, 304 N.C. 729, 288 S.E.2d 381 (1982).

Plaintiff concedes that there were arbitration clauses in the agreements he signed, although he claims he was fraudulently induced into signing the 1999 agreement. But see Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 403-404 (1967) (articulating when fraudulent inducement claims should themselves be submitted to arbitration, and when the courts may adjudicate).

Fortunately, however, the Court need not resolve the Plaintiff's fraudulent inducement claim to resolve the subject motions, because whether or not there was a valid arbitration clause, its scope clearly did not extend to the broad and diverse claims raised in this action. See Glass, 114 F.3d at 452.

The 1972 agreement was a simple stock purchase agreement, not the broader shareholder agreement urged by Defendants. The only parties to the agreement were Long and the now defunct Silver-Pilzer, and the scope of the agreement was not broad. Indeed, the 1972 agreement simply provided for the purchase of Long's Regency shares and his continued employment, placed restrictions on Long's ability to sell his Silver-Pilzer shares or assign rights under the contract, formulated a method for valuing Long's shares, and permitted Silver-Pilzer to carry life insurance on Long. It is a considerable stretch even to argue that this very narrow and limited agreement intended to cover or compel arbitration of the broad and diverse claims at issue in this lawsuit.

Nor was the 1999 agreement the all-inclusive agreement between the shareholders urged by the Defendants. To the contrary, much like the 1972 agreement, the 1999 agreement simply restricts each shareholder's right to sell stock, and establishes a method for redemption of the shares upon either the termination of Regency employment or death.

In short, based on the plain language of both the 1972 and the 1999 agreements, the parties could not have possibly intended to bind themselves to arbitration of the claims raised in the instant Complaint. See Glass, 114 F.3d at 452; Routh, 108 N.C. App. at 271, 423 S.E.2d at 794; and Blow v. Shaughnessy, 68 N.C. App. 1, 16, 313 S.E.2d 868, 876-877, disc. review denied, 311 N.C. 751, 321 S.E.2d 127 (1984). See also Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566, 1568 (11th Cir. 1984); Necchi S.p.A. v. Necchi Sewing Machine Sales Corp., 348 F.2d 693, 698 (2d Cir. 1965); Hersman, Inc. v. Fleming Cos., Inc., 19 F.Supp.2d 1282, 1287 (M.D.Ala 1998) aff'd, 180 F.3d 271 (11th Cir. 1999).

B. Motion to Dismiss for Lack of Personal Jurisdiction, Motion to Stay and, Motion for More Definite Statement

A federal district court may exercise personal jurisdiction over a non-resident defendant in a diversity action only if courts of that state have personal jurisdiction over the defendant. Omni Capital Int'l Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987); Elliott Mach. Corp. v. John Holland Party, Ltd., 995 F.2d 474, 477 (4th Cir. 1985).

When the court's exercise of personal jurisdiction is challenged under Federal Rule of Civil Procedure 12(b)(2), as here, "the plaintiff has the ultimate burden to prove the existence of jurisdiction by a preponderance of the evidence." Mylan Labs, Inc. v. Akzo, N.V., 2 F.3d 56, 59-60 (4th Cir. 1993); Combs v. Bakker, 886 F.2d 673, 676 (4th Cir. 1989). The question of personal jurisdiction is evaluated under a two-step analysis, wherein the court first determines whether the state's long-arm statute confers jurisdiction; and second, the court must determine whether an exercise of jurisdiction complies with the federal constitutional standards of due process. See Omni Capital Int'l Ltd., 484 U.S. at 102-03; Ellicott Mach. Corp., 995 F.2d at 477;

Peanut Corp. of Am. v. Hollywood Brands, Inc., 696 F.2d 311, 313 (4th Cir. 1982); D.P. Riggins & Associates, Inc. v. American Board Companies, Inc., 796 F.Supp 205, 208 (W.D.N.C. 1992); and General Latex and Chemical Corp. v. Phoenix Medical Technology, Inc., 765 F.Supp. 1246, 1249 (W.D.NC. 1991).

As to the first prong of the analysis, N.C.G.S §1-75.4[1], the long-arm statute, is a legislative attempt to allow North Carolina Courts to assert personal jurisdiction to the full extent permitted by the due process clause and should be construed liberally in favor of finding personal jurisdiction. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977); Marion v. Long, 72 N.C. App. 585, 586, 325 S.E. 2d 300, 302, rev. denied, 313 N.C. 604, 330 S.E.2d 612 (1985); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 570, 289 S.E.2d 607, 609, petition denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

Therefore the Fourth Circuit has stated that the normal two step inquiry merges into one, because the North Carolina long-arm statute allows the exercise of personal jurisdiction in all cases where such jurisdiction does not

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[1] N.C.G.S § 1-75.4 states as follows (emphasis added):

"A court of this State ... has jurisdiction over a person ... under any of the following circumstances:

(1) Local Presence or Status. - in any action, whether the claim arises within or without this States, in which a claim is asserted against a party who ...

d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(5) Local Services, Goods or Contracts. - in any action which ...

b. Arises out of services actually performed for the Plaintiff by the Defendant within this state ...

contravene due process. See, e.g., Ellicott Machine Corp., 995 F.2d at 477; Ramsey Products Corporation, v. Morbark Industries, Inc., 823 F.2d 798, 802 (4th Cir. 1987); Vishay Intertechnology, Inc. v. Delta International Corp., 696 F.2d 1062, 1065 (4th Cir. 1982) and General Latex, 765 F.Supp at 1249.

Accordingly, personal jurisdiction exists if the Plaintiff can satisfy the second prong of the test - - that is, if Hertz Herson has established "minimum contacts" with North Carolina such that requiring them to defend an action in North Carolina would not offend traditional notions of fair play and substantial justice. International Shoe Company v. Washington, 326 U.S. 310, 316 (1945). Minimum contact exists "where a defendant has purposefully directed its activities at the residents of the forum state so that the defendant can be said to have purposefully "availed [it]self of the privilege of conducting business there." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985).

The following factors are examined when determining whether minimum contacts with the forum state exist:

(1) The quantity of the contacts;
(2) The nature and quality of the contacts;
(3) The source and connection of the cause of action with those contacts;
(4) The interest of the forum state and convenience
(5) Whether the Defendant invoked benefits and protection of the laws of the forum state

World-Wide Volkswagen Corp., 444 U.S. at 292, see also, General Latex and Chemical Corp., 765 F.Supp. at a249.

As set forth above with particularity, the record establishes that Hertz Herson has had at least "minimum contacts" with the State of North Carolina for many years.

Specifically, the record establishes that Hertz Herson had performed accounting and other financial services for Regency's North Carolina Operations since the early 1970's, involving numerous trips to North Carolina by multiple Hertz Herson partners and employees; performed additional services from time to time at the Regency factory in Catawba County, North Carolina, including consulting, overseeing the installation of a new computer system, recruiting a company comptroller, and designing, implementing, and maintaining cost control systems; and had performed services for other North Carolina businesses from time to time.

Numerous decisions have found the minimum contacts test satisfied with far less contact than is present in this case. See, e.g., Anita's New Mexico Style Mexican Food, Incorporated, v. Anita's Mexican Foods Corporation, 201 F.3d 314, 319 (4th Cir. 2000) (personal jurisdiction proper where defendant placed goods in the stream of commerce which were ultimately purchased in forum state); English & Smith v. Metzger, 901 F.2d 36, 38 (4th Cir. 1990) (personal jurisdiction proper over out-of-state attorney who contacted attorney and made several phone calls and mailings into forum state): Hirschkop & Grad, P.C. v. Robinson, 757 F.2d 1499, 1502 (4th Cir. 1985) (personal jurisdiction proper over out-of-state client whose contacts with the forum state were only by phone or fax except for two brief personal visits); and Ciba-Geigy Corporation v. Barnett, 76 N.C. App. 605, 609, 334 S.E.2d 91, 93, (1985) (personal jurisdiction proper over sales representative who only came to North Carolina on one occasion for a week long sales meeting at company headquarters).

III. ORDER

NOW THEREFORE, IT IS ORDERED:

1. "Defendants Louis L. Silver, Ronald Grossman, Kevin Creegan, and Regency Home Fashions, Inc.'s Motion to Compel Arbitration and Stay Litigation" (document #5) and the "Motion of Defendant Hertz, Herson & Company, to Dismiss for Lack of Personal Jurisdiction, or, in the Alternative, for a More Definite Statement and Stay of Proceedings" (document #7) are both **DENIED.**

2. The Defendants shall file Answer(s) to the Complaint on or before June 9, 2000.

3. The parties shall thereafter conduct the Initial Attorney's Conference, and shall so certify to the Court, in accordance with the Local Rules of the Western District of North Carolina. Following certification that the Initial Attorney's Conference has been held, the Court will schedule an Initial Pretrial Conference.

4. The Clerk is directed to send copies of this Memorandum and Order to counsel for the parties.

SO ORDERED, this 28th day of April, 2000.

\s\ Carl Horn
CARL HORN
Chief U.S. Magistrate Judge

United States District Court for the
Western District of North Carolina

May 1, 2000
* * MAILING CERTIFICATE OF CLERK * *

Re: 5:00-cv-00022

True and correct copies of the attached were mailed by the clerk to the following:

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cc:

Judge	( )
Magistrate Judge	( )
U.S. Marshal	( )
Probation	( )
U.S. Attorney	( )
Atty. for Deft.	( )
Defendant	( )
Warden	( )
Bureau of Prisons	( )
Court Reporter	( )
Courtroom Deputy	( )
Orig-Security	( )
Bankruptcy Clerk's Office	( )
Other _____	( )

Date: 5-1-00

Frank G. Johns, Clerk
By: \s\ _____
Deputy Clerk

TITLE 9 - ARBITRATION

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no

agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States

Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Section 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration -

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration -

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application. The judgment shall be docketed as if it was rendered in an action. The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

Section 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 16. Appeals

(a) An appeal may be taken from -

(1) an order -

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

AGREEMENT made as of the 1st day of August, 1972, by and between SILVER-PILZER CO., INC., a New York corporation, hereinafter referred to as the "Corporation", and D. JOE LONG, of Newton, North Carolina, hereinafter referred to as "Long".

Long has heretofore been employed by REGENCY BEDSPREAD CORPORATION, a North Carolina corporation (herein "Regency"), eighty (80%) per cent of the common stock of which is owned by the Corporation, and twenty (20%) per cent by Long. The Corporation is willing to employ Long and in connection with his employment to sell to Long an equity interest in the Corporation; Long is willing to be employed by the Corporation and to purchase an equity interest in the Corporation, all upon the terms and conditions as hereinafter set forth.

NOW, THEREFORE, in consideration of the premises and of the mutual agreements hereinafter set forth, the parties hereto do hereby agree as follows:

ARTICLE I

1.1 Subscription. Long hereby subscribes for, and agrees to purchase Five and 263/1000ths (5.263) shares of the Class B common stock of the Corporation (the foregoing representing five (5%) per cent of the issued and outstanding shares of the common stock of the Corporation), the consideration for such purchase being twenty-five (25) shares of the common stock of Regency presently owned by Long, and the sum of Thirteen Thousand Five Hundred ($13,500.) Dollars, the consideration to be delivered by Long upon the delivery to him of a certificate or certificates representing ownership of the shares to be purchased.

For the purposes of this Agreement, the shares of Regency to be delivered by Long are deemed to have a value of Two Thousand Five Hundred ($2,500) Dollars, so that the total subscription price is deemed to be Sixteen Thousand ($16,000.) Dollars.

ARTICLE II

2.1 Employment of Long. During the period when Long is a shareholder of the Corporation, he shall be employed on a full time basis in an executive capacity by the Corporation or one of its subsidiaries or affiliates. He shall perform such duties of an executive character as are from time to time assigned to him by the board of directors of the Corporation and receive such compensation as may be established by the board of directors. Long's salary and other compensation for services performed shall be reviewed annually within one hundred twenty (120) days of the end of the fiscal year of the Corporation.

ARTICLE III

3.1 Sale of Shares by Long during Employment. Long may dispose of his shares in the following manner during the term of his employment:

(a) Long may at any time transfer his shares to another employee of the Corporation, if the transferee accepts as a condition of transfer the terms and conditions of this Agreement and if the board of directors of the Corporation consents both to the transfer and to the form of transfer agreement or the arrangement for transfer.

(b) Long may sell his shares to any person, provided that he shall first offer to the Corporation, in writing, the shares which he desires to sell and thereby grant to the Corporation an option to purchase all or a portion of such shares at the price, and upon the conditions, set forth in Sections 3.3 and 3.4 hereof. If the Corporation declines to exercise such option with regard to all of the offered shares within ninety (90) days of its receipt thereof, Long shall have the right to sell or otherwise dispose of those shares not purchased by the Corporation without restriction.

3.2 Sale of Shares upon Termination of Employment. The termination of employment by Long shall require the sale of all of his shares to the Corporation upon the terms of Sections 3.3 and 3.4 hereof. For the purposes of this Agreement, termination of employment shall include:

(a) dismissal or resignation;

(b) disability of Long, such disability to be determined by the board of directors of the Corporation; or

(c) death.

3.3 Purchase of Shares upon Termination of Employment. Immediately upon the termination of the employment of Long, the title to the shares owned by him shall vest in the Corporation and the Corporation shall become obligated to pay for these shares in the following manner:

(a) The purchase price shall be the Certificate Value of the shares as hereinafter defined and shall be payable in four (4) equal installments, to be made six (6), twelve (12), eighteen (18) and twenty-four (24) months, respectively, following the date on which title to the shares vested in the Corporation; provided, however, that:

(i) no installment payment shall be less than Ten Thousand ($10,000) Dollars nor more than Fifteen Thousand ($15,000) Dollars, so that if the total purchase price for the shares is less than Forty Thousand ($40,000) Dollars or more than Sixty Thousand ($60,000) Dollars, the number of semi-annual installments payable shall be adjusted accordingly, and

(ii) the Corporation shall have the right at any time to accelerate the payment of any installment. The installments shall bear interest at the rate of six (6%) per cent per annum from the date when title to the shares has vested in the Corporation.

(b) In computing any amounts due to Long, the Corporation shall deduct the cost of any necessary stock transfer stamps and other expenses incidental to the transfer of the shares and, in addition, shall have the right to deduct any sums of money owing to the Corporation by Long.

(c) Failure of the Corporation to make any installment payment when due shall not be deemed a default unless the Corporation shall fail to make such payment within (10) days of its receipt of a written request therefor.

3.4 Purchase Price of Shares upon Termination of Employment. The purchase price of shares of Class B common stock of the Corporation sold to the Corporation by Long as a result of the termination of his employment, shall be the Certificate Value of such shares. Certificate Value shall mean the value of a share of the Corporation as set forth in writing filed with the Corporation and signed by the owners of all of the issued and outstanding common shares of the Corporation. The Shareholders shall have the right to file with the Corporation a Certificate of Value at any time.

In the event that the date of the last Certificate of Value is more than one (1) year prior to the date when shares are offered for sale, the last Certificate of Value shall be adjusted to the end of the fiscal year of the Corporation last preceding the date of such offer by adding to or subtracting from such Certificate Value the net earnings or losses, as the

case may be, after provision for income taxes, of the Corporation for the fiscal year or years intervening between the date of the last Certificate of Value and the date of the offer.

A Certificate of Value signed by the owners of all of the issued and outstanding common shares of the Corporation shall be conclusively binding upon all of the Shareholders.

3.5 Repurchase Agreements. No provision of this Agreement shall be construed to prohibit the Corporation from entering into repurchase agreements with respect to any shares owned by Long.

ARTICLE IV

4.1 Insurance Policies. The Corporation is hereby authorized to own and to carry policies of life insurance on the life of Long. Long agrees to cooperate with the Corporation in effecting the purchase of such policies. The amount of such insurance shall be discretionary with the board of directors.

ARTICLE V

5.1 Assignability. Neither the shares, nor the right of Long to receive any payments pursuant to the terms of this Agreement, any Transfer Agreement or any Repurchase Agreement shall be subject to alienation or assignment, except that, if the board of directors of the Corporation shall, in its discretion, consent thereto, any such share, or right to receive any such payment may be assigned to any bank or trust company but only upon such terms as the board of directors shall approve.

ARTICLE VI

General Provisions

6.1 Arbitration. Any and all disputes and controversies arising out of or in connection with this Agreement, or with respect to the construction and interpretation thereof, or concerning the rights of any one or more parties hereto against any one or more parties hereto, or the respective obligations of each party hereto to each other party hereto, shall be determined by arbitration in accordance with and pursuant to the then existing rules of the American Arbitration Association.

6.2 Term of Agreement. This agreement shall commence on the date first set forth above and continue indefinitely unless sooner terminated.

6.3 Endorsement of Share Certificates. The certificate or certificates of shares of the Corporation to be purchased by Long shall bear upon the face of each the following legend:

> "The shares as represented by this certificate are subject to the terms, conditions and provisions of an Agreement dated August 1, 1972, by and between D. Joe Long, and Silver-Pilzer Co., Inc."

6.4 Notices. All offers, acceptances and notices to be given or sent under this Agreement shall be in writing and sent by certified or registered mail, return receipt requested:

(a) to the persons to be notified, at the addresses appearing upon the transfer books of the Corporation at the time that the same shall be mailed, except that, with respect to the acceptance of an offer to purchase shares in the event of death or incapacity, such acceptance or notice shall be forwarded to the personal representative of the estate of Long at the address given in papers on file in the Surrogate's or Probate Court or with the Corporation, or, in the event that no such personal representation has been designated and qualified, then such notice shall be sent to the next-of-kin of Long at the address set forth in this Agreement for such shareholder; and

(b) to the Corporation, at its principal office.

6.5 Modification. This Agreement may not be modified, amended, changed or altered, except upon the written consent of the individual parties hereto.

6.6 Governing Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of New York.

6.7 Severability. The illegality of any of the terms, conditions or covenants of this Agreement shall not affect the remaining terms, conditions and covenants hereof.

6.8 Specific Performance. The parties agree and acknowledge that the shares of the Corporation are unique and that the parties hereto may obtain relief by way of injunction, specific performance and such other equitable relief that they may be entitled to.

6.9 Remedies Not Exclusive. The remedies granted in this Agreement are cumulative and not exclusive, and are in addition to any and all other rights and remedies granted and permitted under and pursuant to the law.

6.10 Waiver.

(a) No waiver of the terms, conditions and covenants of this Agreement shall be binding and effective unless the same shall be in writing signed by the parties hereto.

(b) A waiver of any breach of the terms, conditions and covenants of this Agreement shall be for that one time only and not for any subsequent breach.

6.11 Binding Agreement. This Agreement shall be binding upon the parties hereto, their heirs, assigns, successors and legal representatives.

6.12 Headings. The headings on the paragraphs are for convenience only and shall in no wise be deemed part of the terms, conditions and covenants of this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

SILVER-PILZER CO., INC.

By \S\ _____
President

\S\ _____
D. Joe Long

ATTEST:

_____
Asst. Secretary

REGENCY HOME FASHIONS, INC.

SHAREHOLDERS AGREEMENT

Shareholders Agreement ("Agreement") dated as of May 12, 1999 by and among Louis L. Silver Living Trust dated July 1, 1988, as amended ("LLS Trust"), a trust organized under the laws of the State of New York, as legal owner of the shares beneficially owned by Louis L. Silver ("Silver"), chairman of the Corporation (as hereinafter defined), Ronald Grossman ("Grossman"), D. Joe Long ("Long") and Kevin Creegan ("Creegan") (LLS Trust, Long, Grossman and Creegan each individually referred to as a "Shareholder" and collectively referred to as the "Shareholders") and Regency Home Fashions, Inc., a corporation organized under the laws of New York (the "Corporation"), with offices at 261 Fifth Avenue, New York, New York 10016.

WHEREAS, 5,000 shares of the Class A voting common stock of the Corporation are authorized, of which 1,200 shares are issued and outstanding. 80,000 shares of the Corporation's Class B non-voting common stock are authorized, of which 51,450 shares are issued and outstanding; and

WHEREAS, the Shareholders wish to make certain arrangements with respect to the disposition of their Shares (as hereinafter defined) upon the occurrence of the termination of employment of Long, Grossman or Creegan or death of Long, Grossman, Creegan or Silver as further described herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties agree that:

ARTICLE I
OWNERSHIP

1. **Ownership; Acknowledgement**. Each Shareholder acknowledges and agrees that his Share ownership of the Corporation is as set forth on Schedule I hereto. The Shares owned by Grossman and Creegan have been pledged pursuant to separate pledge agreements (the "Pledge Agreements") executed, respectively, by Grossman and Creegan to secure their obligations to the Trust and Long.

ARTICLE II
TRANSFER

2.(a) **General Restrictions on Share Transfer**. A Shareholder shall not be permitted to assign, sell, transfer, pledge, hypothecate, mortgage, create a security interest in or lien on, encumber, give, place in trust (voting or other), or otherwise dispose of all or any portion of his Shares now owned or hereafter acquired, except upon the conditions and in the manner set forth in this Agreement. Any purported transfer, assignment, sale, pledge, hypothecation, mortgage, creation of security interest in or lien on, encumbrance of, gift of, trust (voting or other) of, or other disposition of any Shares by any Shareholder in violation of the provisions of this Agreement shall be deemed null and void. Notwithstanding the foregoing and the provisions of Subparagraph (b) below, upon the redemption of Shares by the Corporation and issuance of Notes to the Trust and Long, pursuant to Article III, below, Grossman shall have the right to transfer (by sale or otherwise) shares owned by Grossman to one or more employees of the Corporation, provided that, following any such transfer, (i) Grossman continues to own at least fifty-one percent (51%) of all of the Corporation's then outstanding Shares, and fifty-one percent (51%) of the Corporation's then outstanding Voting Shares, and (ii) the transferee agrees in writing (and his or her certificate is

appropriately legended) to be bound by the terms of this Agreement applicable to Creegan.

(b) **Right of First Refusal**. Notwithstanding the provisions in paragraph (a) above, if a Selling Shareholder shall receive a bona fide written offer to purchase for all cash, for all, but not less than all, of his Shares ("Offer") from an unaffiliated, unrelated independent third party ("Offeror") which he is willing to accept, he shall promptly give written notice of such Offer (including a copy of the offer and all of the terms of the Offer and the name and address of the Offeror) (the "Notice") to the Corporation, who shall have the option to purchase, at the lesser of (i) the price, if any, stated in such Offer, or (ii) the Purchase Price (as defined in Article VIII hereof), all of the Shares within twenty (20) days of receipt of such Notice. If the Corporation elects not to purchase all of the Selling Shareholder's Shares for any reason within the aforesaid twenty (20) day period, the Selling Shareholder shall thereafter give Notice to LLS Trust, which shall then have the opportunity to purchase such Shares at such lesser price within twenty (20) days of receipt of such Notice. If LLS Trust elects not to purchase all of the Selling Shareholder's Shares within the aforesaid twenty (20) day period, the Selling Shareholder shall thereafter give Notice simultaneously to each of the remaining shareholders (the "Remaining Shareholders"), as the case may be, who shall have the primary right to purchase the Shares at such lesser price, in proportion to their relative Share ownership, within twenty (20) days of receipt of such Notice. To the extent that any Remaining Shareholder elects not to purchase all of the Shares in proportion to his relative Share ownership, each other Remaining Shareholder shall have the opportunity to purchase such Shares, pro rata, in accordance with these provisions. Exercise of the rights of first refusal contained in this Article II shall be signified by written notice of the acceptance ("Notice of Acceptance") of the offer given by the Selling Shareholder to the Corporation, LLS Trust or the

Remaining Shareholders, as the case may be, within the aforesaid applicable twenty (20) day period. If the Selling Shareholder's Shares are not so purchased pursuant to such Notice of Acceptance, then the Selling Shareholder may, only for a period of sixty (60) days thereafter, sell all of his Shares (which shall remain subject to this Agreement) to the Offeror only upon the terms contained in the Offer, provided that the Offeror executes and becomes a party to this Agreement. If (i) such sale is not effected within such sixty (60) day period or (ii) an agreement to sell is entered into within such sixty (60) day period but the Offeror defaults, then, prior to any sale of his Shares thereafter, the Shareholder shall be required to recommence the procedure called for by this Article II.

(c) **Closing**. The closing of the sale of a Selling Shareholder's Shares pursuant to paragraph (b) of this Article II shall take place on a date ("the Closing Date") within thirty (30) days after receipt of the Notice of Acceptance or the acceptance of such Offer, as the case may be, and in accordance with the provisions of Article IV, as applicable.

(d) **Payment of the Purchase Price**. Payment of the Purchase Price for the Selling Shareholder's Shares sold pursuant to this right of first refusal shall be made on the Closing Date (x) in the case of the Corporation, by delivery of a Subordinated Promissory Note (as defined in Article III) dated the Closing Date, for the principal amount of One Hundred (100%) Percent of the Purchase Price, which shall be payable in forty (40) equal quarter-annual installments of principal and interest, the first installment being due at the Closing, including interest on the principal balance at the rate of Seven (7%) Percent per annum from the closing and (y) in the case of LLS Trust or the Remaining Shareholders, as the case may be, by the delivery to the Selling Shareholder of a promissory note substantially in the form annexed hereto as Exhibit B dated the Closing Date, for the principal amount of One Hundred (100%) Percent of the Purchase Price, which shall be payable in forty (40) equal

quarter-annual installments of principal and interest, the first installment being due at the Closing, including interest on the principal balance at the rate of Seven (7%) Percent per annum from the closing. If a final determination of the Purchase Price has not been made by the Closing Date, then the Closing shall nevertheless occur with the Purchase Price being established based upon the Book Value of the Corporation as estimated by the Corporation's CPAs, and the Subordinated Notes to be delivered pursuant to Paragraph 3(b) shall have a principal balance based upon such estimated Purchase Price. Upon final determination of the Purchase Price, the Corporation shall issue new Subordinated Notes that correctly reflect the Purchase Price, in replacement of the Subordinated Notes issued at the closing.

ARTICLE III
REDEMPTION

3.(a) **Redemption of Shares Upon Termination or Death**. Notwithstanding the restrictions set forth in Article II, a Selling Shareholder shall be deemed to have offered to sell to the Corporation, and the Corporation shall be required to redeem, all of his Shares so offered for the Purchase Price, on the date of the Termination or Death of such Shareholder, as described below.

(b) **Termination or Death of Long**. In the event of the Termination (as defined in Article VIII hereof) or Death of Long (except if the Death of Silver precedes the Termination or Death of Long as provided for in paragraph (c) below), then Long shall sell and the Corporation shall redeem for the Purchase Price, all of the Shares of Long in exchange for which the Corporation shall deliver a Subordinated Promissory Note in substantially the form annexed hereto as Exhibit A-2 (the "Subordinated Note") for the principal amount of One Hundred (100%) Percent of the Purchase Price which shall be payable in forty (40) equal quarter-annual installments of principal and interest, the first

installment to be due at the Closing, including interest on the principal balance at the rate of Seven (7.0%) Percent per annum from the closing.

(c) **Termination or Death of Grossman or Creegan**. In the event of the Termination (as defined in Article VIII hereof) or Death of Grossman (unless the death of Silver precedes the Termination or Death of Grossman) or the Termination or Death of Creegan at any time, then Grossman or Creegan (as the case may be) shall sell, and the Corporation shall redeem, for the Purchase Price, all of the Shares of such Selling Shareholders in exchange for a cash payment of the Purchase Price (such cash shall be applied first to pay in full any unpaid amounts owing by the Selling Shareholders). In addition, upon the Termination or Death of Grossman while Silver is living, the LLS Trust shall have the option, exercisable by notice given within ninety (90) days after such Death of Termination, to purchase Creegan's Shares for the price and on the same terms and conditions as if Creegan had died on the date of such Termination or Death of Grossman.

(d) **Death of Silver**. Upon the Death of Silver, both the LLS Trust and Long (if the Termination or Death of Long has not occurred) shall sell, and the Corporation shall redeem, all of the Shares owned by each of them, respectively, for the Purchase Price. The Corporation shall deliver a Subordinated Promissory Note in the form of Exhibit A-2 to Long and in the form of Exhibit A-1 to the Trust for the principal amount of One Hundred (100%) Percent of the Purchase Price, which shall be payable in forty (40) equal quarter-annual installments of principal and interest, the first installment to be due at the Closing, including interest on the principal balance at the rate of Seven (7%) Percent per annum from the Closing. The Subordinated Notes, when delivered, will be secured by the Pledge Agreements and Guaranties being delivered by each of Grossman and Creegan to the Trust and Long concurrently with the execution hereof.

(e) **Closing**. The Closing (as hereinafter defined) of such redemption shall be as provided in Article IV hereof.

(f) **Corporate Restrictions and Obligations After Redemption**.

(i) For as long as any Subordinated Promissory Note delivered hereunder for the redemption of Shares deliverable upon the Death of Silver remains outstanding, the Corporation shall (a) provide reasonable access to the Selling Shareholder or its representatives to inspect the Corporation's books and records, (b) provide semi-annual statements of the Corporation to the Selling Shareholder (c) not increase Grossman's base compensation beyond that in effect at Silver's death or Creegan's base compensation beyond the greater of $500,000 or that in effect at Silver's death, plus (x) a bonus for Grossman equal to 15% of, and (y) a bonus for Creegan of 3.75% of, Regency's S corporation income before reduction for the 15% and 3.75% bonuses, and (d) not make dividend distributions in excess of the Federal and State income taxes imposed on the Shareholders on Regency's income reportable for S corporation purposes (at the marginal rate of the Shareholder with the highest marginal rate).

(ii) If there shall be an Event of Default under any Subordinated Promissory Note (the "Silver Note") delivered hereunder for the redemption of Shares deliverable upon the Death of Silver, the Corporation shall (i) reduce Grossman's total annual rate of compensation to $250,000, and (ii) unless otherwise agreed to by the holder of the Silver Note, cease paying any compensation, dividends or other distributions of any kind to Grossman or Creegan as of 90 days after the Event of Default, except for the dividend distributions to pay taxes referred to in Paragraph (i)(d) above.

(iii) No Shareholder shall vote or consent in any capacity in a manner which would cause the Corporation to violate any of the covenants contained in paragraphs (i) or (ii) above.

ARTICLE IV
CLOSING

4.(a) **Closing**. The closing ("Closing") of the redemption of a Selling Shareholder's Shares by the Corporation, in accordance with Article III above, shall take place at the offices of the attorneys for the Corporation within thirty (30) days after the Termination or Death of a Shareholder.

(b) **Title**. At the Closing, the Selling Shareholder shall deliver good title, free and clear of all liens, claims and encumbrances to the certificates evidencing the Shares being transferred, together with duly executed stock powers and whatever other documents are reasonably requested by the Corporation, against issuance of the Subordinated Note in the amount of the Purchase Price. In the event of Termination, the Selling Shareholder shall also, if requested by the Corporation, deliver at the Closing his resignation as an officer and director of the Corporation.

ARTICLE V
LEGEND

5. **Certificate Legend**. Certificates for Shares shall, in addition to any notice thereon required by law or by the Certificate of Incorporation (as may be amended and/or restated) or By-Laws (as may be amended and/or restated) of the Corporation, bear a legend conspicuously on the face or back thereof with a statement in substance as follows:

> The sale, transfer, assignment, pledge, gift, hypothecation, or other encumbrance or disposition of the shares of stock represented by this share certificate is subject to, and may be made only in accordance with, the terms of a Shareholders' Agreement dated the 12th day of May, 1999, and any amendments thereto, copies of which are on file with the Corporation and may be examined during regular business hours at the office of the Corporation. Any sale, pledge, transfer, bequest, hypothecation, mortgage, with respect to, or any other disposition or encumbrance of this Certificate in violation of said Shareholders' Agreement is invalid.

Any certificate evidencing shares of stock which is hereafter issued shall bear the same legend

ARTICLE VI
TERM

6. **Term of Agreement**. This Agreement shall terminate upon the full and absolute repayment of the last Subordinated Note deliverable pursuant to this Agreement; provided that in the event the Termination or Death of Grossman occurs prior to the Death of Silver, LLS Trust (on behalf of Silver) may unilaterally terminate this Agreement at any time. Any termination of this Agreement shall not affect the rights and/or obligations that have accrued by reason of the Termination or Death of a Shareholder or redemption of the Shares owned by a Shareholder hereunder. The termination of this Agreement shall not serve to terminate any obligations or remedies of the Shareholders for any act or failure to act occurring prior to such termination.

ARTICLE VII
CONFLICT

7. **Conflict**. Each Shareholder represent to the other Shareholdes that it/he is not bound by any agreements or restrictions interfering with its/his entering into this Agreement or performing this Agreement in accordance with its terms and agrees that this agreement supercedes any and all prior agreements, whether oral or written, that pertains to its subject matter.

ARTICLE VIII
DEFINITIONS

8. **Definitions**.

(a) "Book Value" shall mean the Corporation's book value determined as of the previous December 31st if the Termination or Death of a Shareholder causing the need to determine the Book Value occurs during the first six months of the calendar year or determined as of the subsequent December 31st if the Termination or Death occurs during the second six months of the calendar year, by the Corporation's certified public accountants (the "Company's CPAs"), in accordance with generally accepted accounting principles, consistently applied, excluding any amount for goodwill and allowing for appropriate reserves and contingent liabilities. The Book Value shall be appropriately adjusted to reflect any changes in the capital stock of Regency and any distributions by Regency after the December 31st as of which the Book Value is determined. Any selling Shareholder may hire his or its own independent certified public accountants ("Seller's CPAs")to make their own determination of Book Value Per Share, determined as above, (which accountants shall be given access, as requested, to the Corporation's book and records), and if their determination is more than Three (3%) Percent higher than the determination of the Company's CPAs, then the

Company's CPAs and the Seller's CPAs shall jointly select a third CPA firm to determine the book value, and their determination shall be binding on all parties.

(b) "Death" shall mean the death of a Shareholder

(c) "Purchase Price" shall mean (i) in the case of a sale by Grossman (or his personal representatives), Fifty-Six Thousand ($56,000) Dollars, (ii) in the case of a sale by Creegan (or by his personal representatives) before the Death of Silver, Fourteen Thousand ($14,000) Dollars, and (ii) in all other cases, the Purchase Price Per Share multiplied by the number of shares being sold by a Selling Shareholder or his or its legal representatives.

(d) "Purchase Price Per Share" shall mean (i) "Book Value" divided by the number of Shares (voting and non-voting) issued and outstanding at the date of valuation, or, if greater, in the case of a sale by Silver or Long, (ii) Eleven Million Three Hundred Thousand ($11,300,000) divided by the number of Shares (voting and non-voting) issued and outstanding on the date of this agreement. Appropriate adjustment shall be made to reflect any stock split, stock dividend, recapitalization or redemption of Shares.

(e) "Selling Shareholder" shall mean a Shareholder or his legal representative (or, in the case of Silver, LLS Trust) who is deemed to offer or is seeking to sell his Shares.

(f) "Share" shall mean a share of Class A voting common stock, no par value, or Class B non-voting common stock, no par value, of the Corporation.

(g) "Termination" shall mean the termination of a Shareholder's (other than Silver's) employment with the Corporation, by the Corporation or the Shareholder, for any reason.

ARTICLE IX
MISCELLANEOUS

9. **Miscellaneous**.

(a) **Binding Effect**. This Agreement shall be binding upon and shall operate for the benefit of the Shareholders and their respective executors and administrators, and for the Corporation and its successors and assigns, and shall be binding upon any persons or entities to whom or to which any of the Shares are transferred whether or not in violation of this Agreement, and the executor or administrator of such person, and the successors and assigns of such entity.

(b) **Notices**. Any notice to be given by any party hereunder to any other party shall be in writing, delivered personally, mailed by certified or registered mail, return receipt requested or by a reputable overnight courier providing receipt for same, shall be addressed to the other parties at the addresses provided for below or to such other address as may have been furnished by any party to the other parties pursuant to this paragraph, and shall be deemed to be given on the date of delivery or mailing thereof in accordance with the foregoing.

If to Regency:

Regency Home Fashions, Inc.
261 Fifth Avenue
New York, New York 10016
Attention: Louis L. Silver

If to the LLS Trust or Silver

Mr. Louis L. Silver
47-805 East Vintage Drive
Indian Wells, CA 92210

If to Grossman:

Mr. Ronald Grossman
Regency Home Fashions Inc.
261 Fifth Avenue
New York, New York 10016

If to Long:

Mr. D. Joe Long
1456 Little Hill Road
Newton, NC 28658

If to Creegan:

Regency Home Fashions Inc.
261 Fifth Avenue
New York, New York 10016
Mr. Kevin Creegan

with a copy in all cases to:

Kleinberg, Kaplan, Wolff & Cohen, P.C.
551 Fifth Avenue
New York, New York 10176
Attention: James R. Ledley, Esq.

And

Sonnenschein Nath & Rosenthal
601 South Figueroa Street, Suite 1500
Los Angeles, California 90017-2704
Attention: J.A. Shafran, Esq.

(c) **Amendments**. No modification, amendment or waiver of any of the provisions of this Agreement shall be effective unless in writing and signed by all parties hereto.

(d) **No Waivers**. The failure to enforce at any time any of the provisions of this Agreement, or to require at any time performance by any other party of any of the provisions of this Agreement, shall in no way be construed to be a waiver of such provision, nor in any way to effect the validity of this Agreement or any part hereof, or the right of any party thereafter to enforce each and every such provision in accordance with this Agreement.

(e) **Severability**. In the event that any clause, sentence, paragraph or part of this Agreement shall be deemed invalid, unenforceable or against public policy, it shall not affect, impair, invalidate or nullify the remainder of this Agreement, but the effect thereof shall be confined to the clause, sentence, paragraph or part of this Agreement so invalidated, unenforceable or against public policy.

(f) **Gender/Section Headings**. All references made and pronouns used herein shall be construed in the singular or plural, and in such gender, as the sense and circumstances require. The section headings herein are for convenience only, and shall not affect the meaning of the terms of this Agreement.

(g) **Governing Law; Arbitration**. This agreement shall be construed and enforced in accordance with the laws of the state of New York applicable to contracts and agreements executed and to be performed wholly in New York. The parties hereby irrevocably and unconditionally agree that any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof will be submitted by the parties to binding arbitration by a single arbitrator to take place in New York City under the rules of the American Arbitration Association then in effect. Judgement upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, with the attorneys fees and expenses of the prevailing party paid by the other party.

(h) **Saturday, Sunday or Holiday**. If any date upon which an action or a transaction is to take place shall fall on a Saturday, Sunday or a legal holiday, then such action or transaction shall be done on the first business day immediately succeeding such date.

(i) **Counterparts**. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall be one and the same instrument.

(j) **Specific Performance**. The parties hereby declare that it is impossible to measure in money the damages which will accrue to a party hereto or to the personal representatives of a decedent by reason of a failure to perform any of the obligations under this Agreement. Therefore, if any party hereto or the personal representatives of a decedent shall institute any action or proceeding or enforce the provisions hereof, any person (including the Corporation) against whom such action or proceeding is brought hereby waives the claim or defense therein that such party or such personal representatives has or have an adequate remedy at law, and such person shall not urge in any such action or proceeding the claim or defense that such remedy at law exists.

(k) **Entire Agreement**. This Agreement and the Stock Purchase Agreement supersedes any and all prior agreements among any of the parties with respect to the subject of this Agreement and sets forth the final and entire agreement of the parties hereto with respect to the subject hereof.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date first above written.

LOUIS L. SILVER LIVING TRUST
Dated July 1, 1988, as amended

By: \S\ _____
Louis L. Silver, as Trustee

\S\ _____
Louis L. Silver,
in his individual capacity

\S\ _____
Ronald Grossman

\S\ _____
D. Joe Long

\S\ _____
Kevin Creegan

REGENCY HOME FASHIONS INC.

By: \S\ _____
Louis L. Silver, Chairman

By: \S\ _____
Ronald Grossman,
Chief Executive Officer